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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. [redacted] 105

DAGMAR READEY, HIRAM SCHMEDEL, CHRIS J. MUCKERMAN, HENRY J. JOHNSON, ROBERT BURKHAM, MIGNON E. DIETRICH and JACK WELCH, JR.,
Appellants,

vs.

ST. LOUIS COUNTY WATER COMPANY, a Corporation, and THOMAS C. DUNNE, MAURICE M. ABRAMSON, JOHN J. DOWLING, RICHARD A. HETLAGE, RUSSELL A. GRANTHAM, GEORGE E. BOHRER, JOHN F. MOLLOY, Members of the County Council of the County of St. Louis, Missouri; EDWARD A. WALSH, County Clerk of St. Louis County, Missouri and DR. C. HOWE ELLER, Acting Health Commissioner of the County of St. Louis, Missouri; and SUCCESSORS IN OFFICE,
Appellees.

Appeal from the Supreme Court of Missouri.

STATEMENT AS TO JURISDICTION.

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Appellees.

Appeal from the Supreme Court of Missouri.

STATEMENT AS TO JURISDICTION.

OPINIONS BELOW.

1. (a) The opinion of the Supreme Court of the State of Missouri has not yet been officially reported, but appears in 352 Southwestern Reporter 2nd Advance Sheet.

p. 622. A copy of the opinion of the Supreme Court of Missouri is attached hereto as Appendix A (p. 31). A copy of the trial Court's opinion (Circuit Court of St. Louis County, Missouri) is annexed hereto as Appendix B (p. 53).

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Nature of the Proceedings in the Statute Pursuant to Which It Is Brought.

Appellants are challenging the validity and constitutionality of Ordinance No. 01480 passed by the County Council of St. Louis County, Missouri, on the 27th day of May, 1959, vetoed by the Supervisor of St. Louis County, James H. J. McNary, and thereafter approved by the said County Council on June 3, 1959, overriding the veto.

(Said ordinance is set out in plaintiff's petition, Rec. pages 2, 3, 4; also see Appendix D hereto attached p. 67).

Suit was brought in the Circuit Court of St. Louis County to enjoin the enforcement of the ordinance (Rec. 1-13). The trial Court found in favor of plaintiffs (Appendix B, p. 53; Rec. 739-754; 760-775; 780-792).

Plaintiffs are residents, citizens, taxpayers, and qualified voters of St. Louis County, some of whom reside in incorporated areas, all of whom use the communal water supply of St. Louis County. Defendants appealed to the Supreme Court of Missouri (Division 1) which court rendered a decision upholding the validity of the Ordinance (Appendix A, p. 31). (Mandate reversing trial Court's decision set out Appendix A-1, p. 52.)

Appellants contend that the said ordinance is repugnant to the Constitution of the United States, and more particularly Section I of the 14th Amendment (See Plaintiff's petition, Rec. 6; and Appendix E, p. 69), and the First

Amendment to the Constitution of the United States. The decision of the highest court of the State of Missouri was in favor of the validity of said ordinance.

The decision of the Missouri Supreme Court is also violative of Article I, Section 10 of the Constitution of the State of Missouri pleaded (Rec. 6), which provides:

> "**Section 10. Due process of law.**—That no person shall be deprived of life, liberty or property without due process of law;"

and Article VI, Section 18 (c) of the Constitution of the State of Missouri (pleaded Rec. 7; and also see Appendix F, p. 70); also Article III, Section 22, sub-sections 19, 20 and 24 of the Home Rule Charter for St. Louis County, Missouri (pleaded Rec. 5; also see Appendix G, p. 71), as well as certain Missouri statutes, herewith set out as appendices, it being claimed that the violation of these Missouri constitutional and statutory provisions deprives these plaintiffs of due process of law, and equal protection of the law under the 14th Amendment to the Constitution of the United States.

It is also contended that Section 1983 of 42 U. S. C. A., R. S. 1979 (Civil Action for Deprivation of Rights), is violated by the said decision, and is covered by Section 1 of the said 14th Amendment (See Appendix H for Section 1983, p. 72).

Date of the Judgment or Decree Sought to Be Reviewed and the Time of Its Entry, the Date of the Order Respecting a Rehearing, the Order Overruling the Motion for a Rehearing or to Transfer the Cause to the Court En Banc, the Date the Notice of Appeal Was Filed, and the Court in Which It Was Filed.

This is an appeal from a decision of the Supreme Court of the State of Missouri, Division 1, which court handed down its opinion, in Cause No. 48,453, on December 11,

1961. A motion for rehearing, or to transfer to the court en banc was filed by these appellants on December 23, 1961 (Rec. 816), within the time allowed by the rules of the Supreme Court of Missouri, and the order denying the same was handed down and entered on January 8, 1962 (Rec. 825; also see Appendix C, p. 66) and thereupon became a final judgment of the Supreme Court of Missouri, with no further right of appeal in Missouri. The notice of appeal was filed on March 28, 1962, in the Missouri Supreme Court (Rec. 826).

THE STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION OF THE APPEAL.

Jurisdiction of this court on appeal is conferred by 28 U. S. C. A., Section 1257, Paragraph 2.

Cases Believed to Sustain the Jurisdiction of This Court on Appeal

(a) An ordinance is within the purview or category of a state statute within the meaning of 28 U. S. C. A., Sec. 1257, paragraph 2.

Smith v. California, 361 U. S. 147, 80 S. Ct. 215, 4 L. E. 2d 205;

Zucht v. King, 260 U. S. 174, 43 S. Ct. 24, 67 L. E. 194;

Jamison v. Texas, 318 U. S. 412, 63 S. Ct. 679, 87 L. E. 868.

(b) On the question of accepting compulsory fluoridation of drinking water in a public water system:

Jacobsen v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. E. 643;

Shelton v. Tucker, 364 U. S. 479, 81 S. Ct. 247; 5 L. E. 2d 231;

West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. E. 1628.

(c) On the question of enacting Ordinance No. 01480 by the County Council of St. Louis County, Missouri, **without a vote of the electors.**

Charles W. Baker et al. v. Joe C. Carr, opinion announced March 26, 1962, by United States Supreme Court;

Monroe v. Pape, 365 U. S. 167, l. c. 183, 81 S. Ct. 473, 5 L. Ed. 2nd 492;

Scholle v. Hare decided by the United States Supreme Court April 23, 1962.

(d) On the question of criteria or standards for the amount of fluoride to be used in the drinking water:

Saia v. New York, 334 U. S. 558, l. c. 560, 68 S. Ct. 1148, 92 L. E. 1574;

Kunz v. New York, 340 U. S. 290, l. c. 294, 71 S. Ct. 312, 95 L. E. 280;

Connelly v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. E. 322;

Small v. American Sugar Refining Co., 267 U. S. 233, 45 S. Ct. 295, 69 L. E. 589;

Niemotko v. Maryland, 340 U. S. 268, 71 S. Ct. 325, 95 L. E. 267;

Hague et al. v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423.

The Statute Involved.

Ordinance No. 01480 of the County Council of St. Louis County, Missouri, was passed by the said County Council May 27, 1959. The said Ordinance No. 01480 is filed in a folder by ordinance number, in the Office of the County Clerk of St. Louis County; presently there are no volume numbers or page numbers (Pleaded Rec. 2, 3, 4, also see Appendix D. p. 67).

(c) QUESTIONS PRESENTED BY THIS APPEAL.

(1) Can the County Council of St. Louis County, which is the legislative body of the county, pass an ordinance fluoridating the water of the communal water supply in incorporated areas without a vote of the people, where there is no other practical source of water supply, and where:

(a) The charter provision of the county governing matters of public health requires a vote of the electors, either to enact such legislation or to repeal it, in **incorporated** areas? **Article III, County Council, Sec. 22 (sub-sections 19, 20 and 24) of Home Rule Charter for St. Louis County, Missouri** (Pleaded Rec. 5; also see Appendix G, p. 71).

(b) Where there is a state constitutional provision making legislation regarding public health in counties having **special charters** such as St. Louis County, which at the time of the enactment of the charter had over 400,000 population, subject to the acceptance by vote of a majority of the qualified electors in any municipality or subdivision, which acceptance may be revoked by like vote, thereby limiting the Council's authority in the incorporated cities. **Article VI, Section 18 (c), of the Constitution of the State of Missouri** (which is quoted in the Findings of Fact and Conclusions of Law of the Trial Court (Rec. 768, Rec. 786); also quoted in the Second Amended Petition (Rec. 7), and also, for the Court's convenience, set out in Appendix F, p. 70, hereto attached).

(c) Where there is a state statute making it a criminal offense to put any fluoride in any non-alcoholic drink, which includes water? **Sections 196.125-196.145, R. S. Mo. 1959 (same sections in R. S. Mo. 1949).** (Pleaded Rec. 8; also, see Appendix I, p. 73, hereto attached, for full text of Sec. 196.125; Sec. 196.135; and Sec. 196.145.)

(2) Is not such action on the part of the legislative body (that is, the County Council), both Arbitrary and oppressive, and in direct violation of Section I of the 14th Amendment to the United States Constitution, which is associated with the First Amendment to the United States Constitution; and in violation of the Constitution of the State of Missouri, Article I, Section 10, as well as the said Home Rule Charter of St. Louis County, Missouri, which was enacted pursuant to Section 18 (c) of Article VI of the Constitution of the State of Missouri; and does not such action on the part of the County Council constitute enforcement of mass medication, and deprive the citizens of St. Louis County of the privilege of selecting medication of their own choice in violation of Article I, Section 10 of the Constitution of the State of Missouri? (Pleaded, Rec. 6.)

(3) Can the County Council, in violation of the above mentioned constitutional provisions, enact legislation without a vote of the electors where the record shows, according to some expert witnesses on both sides, that fluoridation of the public water supply is very harmful and dangerous to at least a substantial percentage of the people, both adult and children, and the Missouri Supreme Court opinion admits that "a concentration of one part fluoride to one million gallons of water is highly controversial and that there is substantial evidence to support a conclusion either way?" (Rec. 803.)

(4) Is not the decision and judgment of the Missouri Supreme Court void on its face when it holds that a statute can override a constitutional provision, wherein it holds that Section 192.300, R. S. Mo. 1959 (set out in Appendix J. p. 74), overrides the Constitution of the State of Missouri, Article VI, Sec. 18 (c), and Article III, Sec. 22 (20), of the St. Louis County Charter; as well as Section I of the 14th Amendment to the Constitution of the United States?

Is not this a failure of due process and equal protection of the law? Bailey v. Patterson, 369 U. S. 31, 7 L. E. 2nd 512, 82 S. Ct. 549, decided Feb. 26, 1962. Scholle v. Hare, decided by U. S. Supreme Court April 23, 1962, lay down a principle of law applicable here.

(a) Does not this statute (section 192.300) show on its face that it has no application to the facts in the case at bar, because the St. Louis County Council under the operation of the St. Louis County Home Rule Charter superseded county courts, and **St. Louis County has no county court?**

(b) And in any event, does not Section 192.300 apply only to infectious, contagious, communicable or dangerous diseases, none of which are involved in the case at bar?

(c) Does not said Article III of the Home Rule Charter of St. Louis County, Sec. 22, subsections 19, 20 and 24, by its terms define and limit the authority of the County Council, since the record shows that no election was held in any incorporated area of St. Louis County with regard to the fluoridation program as required under Section 22 (19) of Article III of the County Charter, and Article VI, Sec. 18 (c) of the Constitution of Missouri?

(5) Would not such action on the part of the County Council violate and invade the individual rights and religious liberties of the citizens of the County of St. Louis, in violation of the First Section of the 14th Amendment to the Constitution of the United States, even though the vote of the County Council were limited to the unincorporated areas (which would be a physical impossibility because there is only one water system)?; and furthermore, would majorities of the electors have a right to enact legislation which is dangerous to at least a portion of the population, at the expense of the minorities, in violation of Section I of the 14th Amendment to the Constitution of the United States and in violation of the First Amendment to the Constitution of the United States:

(a) When the effect is to deprive the citizens of St. Louis County of their free choice of medication;

(b) When the result can be accomplished by other methods, which will not endanger the minorities, such as tablets to be administered to the individual patient, and attachable devices to put fluorine in the water of those persons who desire it, at home, and by direct application to the teeth, by a dentist;

(c) When the purpose is not to prevent the spread of infectious, contagious, communicable or dangerous diseases, nor to purify the water; but to act upon the individual.

(6) Is not the exclusive jurisdiction over private water companies in Missouri in the Public Service Commission, under Section 386.250, R. S. Mo. 1959, Par. 7 (pleaded Rec. 8 and 9; also set out in Appendix K, p. 75); and therefore would the County Council of St. Louis County have legal authority to enact the legislation in question without prior approval of the Public Service Commission, as required by law; and would not the failure, as shown by the record, of the County Council to apply for such approval, ipso facto, invalidate its proceedings in this regard, depriving persons within the jurisdiction, of due process of law, and equal protection, within Section I of the 14th Amendment to the Constitution of the United States, either directly or through 42 U. S. C. A., Sec. 1983, R. S. 1979 (Civil Action for Deprivation of Rights)?

(7) Is not such action on the part of the said County Council, wherein the ordinance in providing **approximately** one part fluoride to one million gallons of water, and in establishing no definite criteria or standard for the amount of fluoride to be used in the water, in violation of the decisions of this court?

What does "**approximately**" mean? How flexible is it?

Does not this failure to definitely establish the criteria or standard of the quantity to be used of a dangerous cumulative poison in drinking water violate the law as pronounced by this Court in the Saia, Kunz, Connelly, Small, Niemotko, and Hague cases cited, supra, and sustain the jurisdiction of this Court?

(d) CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

This is an action brought by certain residents and taxpayers in St. Louis County, Missouri (some of whom live in municipalities), to restrain and enjoin the enforcement of Ordinance No. 01480 enacted by the County Council of St. Louis County, Missouri, and to declare the said ordinance void and of no effect. This ordinance provides for the introduction of fluorides into the only water supply system of St. Louis County, by a private water company, and further provides for the indefinite regulation of such fluoridation.

The case was tried in the Circuit Court of St. Louis County, where the trial court found the ordinance unconstitutional; the defendants appealed to the Supreme Court of Missouri, which upheld the constitutionality of the ordinance, reversing the decree of the trial court. The appellants here, first raised the unconstitutionality of the ordinance in their petition (Rec. pages 1 to 13 incl.), pleading Section 1 of the 14th Amendment to the Constitution of the United States (1. c. 6, et seq.); and also throughout the trial of the case in the Circuit Court of St. Louis County, in their evidence presented (Rec. 46); and in their motion for a directed verdict (Rec. 736); claiming the ordinance violates the 14th Amendment to the Constitution of the United States, and also Article I, Section 10 of the Missouri Constitution, and Article VI, Section 18 (c) of the

Missouri Constitution; likewise at the close of the case, in their request for findings of fact and conclusions of law (Rec. 737, 738).

The appellants below (appellees here) denied that Ordinance No. 01480 is unconstitutional, and have done so since the inception of this action, in their pleadings, at the trial of the case in the Circuit Court of St. Louis County, and in their motion for a new trial or in the alternative for an order or judgment in favor of said defendants.

The ordinance provides that the water is to be fluoridated to **approximately** one part fluoride ion per million parts of water (Rec. 3, 4).

Article VI, Sec. 18 (c) of the Missouri Constitution, and Article III, Secs. 19, 20 and 24 of the Home Rule Charter of St. Louis County provide for a vote by the electors in the incorporated areas.

Upon the trial, it was stipulated that there was no general County election wherein the question of fluoridation was submitted to the vote of the people of St. Louis County (Rec. 32).

Nor was there an election held in the municipalities, and the said residents and taxpayers had no opportunity to vote upon the measure of fluoridation (Rec. 54, 55, 65, 77-81).

Plaintiffs (appellants here) offered experts as witnesses who testified that it is not the concensus of medical scientific and dental opinion that fluoridation of water is beneficial (Rec. 146, 147, 150, 236, 254, 259); and also that fluoridation of public water supplies will in some instances aggravate tooth decay (Rec. 149); that children between the ages of 5 and 13 will be harmed (Rec. 178), that they will have disfigured teeth (Rec. 180) where water is fluoridated to one part to a million gallons; and that somewhere

between 10 and 40 per cent of such children will have mottled enamel (Rec. 181).

Further testimony of plaintiffs was to the effect that persons over thirteen would be harmed by drinking water in which the fluoride ion is injected to the extent of one part in a million, in various ways, including gastro-intestinal disturbances and abnormalities of bone growth and structure (Rec. 185); that such fluoridation would harm women bearing children (Rec. 188); and have some effect on the rate of mongolism (Rec. 191). It was further shown that all chemicals bearing the fluoride ion are insidious poisons (Rec. 194, 195) and that such chemicals are cumulative poisons in the human body (Rec. 196). It was further the opinion of qualified witnesses offered by the Plaintiffs that the fluoridation of water for the purposes of controlling tooth decay would be a medicinal application of fluoridation (Rec. 239); that in children, fluorine settles primarily in the teeth; in adults it settles in the bones and soft tissues (Rec. 292); that persons living in areas where water is fluoridated to one part per million gallons will be harmed (Rec. 44, 176, 177, 178, 180, 181, 184, 185, 294, 295, 311).

Fluoride ion is one of the most reactive ions in existence (Rec. 298, 414); it has a chemical affinity for the calcium of bone (Rec. 43-44); has a violent affinity for calcium (Rec. 259).

Fluoride ion affects the body calcium and blood phosphorus level and increases the calcium output of the body (Rec. 302-303, 389, 390).

It changes the compounds in the body to other compounds; therefore they cannot function in their normal physiology (Rec. 414).

Fluorosis is chronic fluorine poisoning, and dental fluorosis is the dental manifestation of chronic fluorine poison-

ing, and results from a poisoning of the tooth bud during the time the tooth is being formed, otherwise known as mottled enamel (Rec. 154, 166).

There is no calcium in sodium fluoride, which is added to public water supplies (Rec. 259), and sodium fluoride (which is a by-product of industry) is 80 times more poisonous than calcium fluoride which is a chemical found in nature (Rec. 663, 664).

The reason there exists a lower caries incident in areas where the water supply is **naturally** fluoridated is that a higher quantity of calcium and phosphorous exists in the soil and thereby promotes stronger teeth (Rec. 441, 442).

Plaintiffs' expert on fluoridation, Dr. Frederick B. Exner, a member of the committee of the AMA on drugs, testified that the American Medical Association has not approved fluoridation; likewise, the following organizations did not approve fluoridation namely: the American Cancer Society, the Texas State Medical Association, the Washington State Medical Association, the Pasteur Institute, the American Waterworks Association (Rec. 150, 151). Another expert, Dr. Geo. L. Waldbott, testified that certain so-called research which favored fluoridation, and was sponsored by fluoride-selling agencies, could not be taken at its face value because it was contrary to true facts (Rec. 322, 331); that the official attitude of many of the organizations favoring fluoridation was taken on a political basis rather than a scientific basis (Rec. 329 to 332).

Of the 21,975,000,000 gallons of water pumped by the water company per year (Rec. 95) obviously only a very small percent is used for drinking (Rec. 112, 281).

The dosage of fluorine cannot be controlled through a public water system as the amount different people drink varies greatly (Rec. 239, 243, 281, 282, 288, 528, 529). Nor can the dosage be controlled away from the

point of injection of the fluoride because the fluoride content in the water can be concentrated by evaporation; it can be reduced by corrosion of iron; there are forces to vary the content anywhere throughout the delivery system; and the fluoride content will be increased by boiling, as when food is being cooked in water (Rec. 403, 404, 405).

It was further shown it is impossible to deliver water at the tap containing uniform proportions of fluorine so as to control the dosage (Rec. 402, 403).

There are other ways of fluoridation, permitting control of the dosage and much safer, to-wit: direct or topical application to the teeth so that none of the chemical gets into the body system; pills for solution to be taken in measured quantities; tablets to put in drinking water as prescribed by a physician (Rec. 238 to 241, 250, 251, 252, 253, 259).

Both sides testified that caries in teeth is not a communicable disease, and could not create an epidemic (Rec. 238, 239, 533).

Witnesses offered by the defendants as experts testified that in their opinion a water supply which contained one part per million of fluoride ion would not be harmful in any respect to persons who drink it (Rec. 494); that there is no difference in the fluoride ion between that found naturally in water and that artificially provided in water (Rec. 495); that the fluoride ion contained in public water supply in one part per million is very beneficial to persons drinking it and particularly children in producing resistant enamel on teeth (Rec. 496). It was further testified that no health defect has been noticed in communities that have fluoridation in water even up to the extent of ten to twelve parts per million (Rec. 501) although the optimum amount would be approximately one part per million. It was the opinion of these witnesses offered by the defendants that no harmful defect of the tissues or parts of the

body are caused by the drinking of fluoridated water (Rec. 503, 504, 505); that fluoridated water in the form prescribed was not poisonous (Rec. 505) and that some portion of fluoride is retained, approximately one-third (Rec. 507), but this varies with the age of the individual and amount of new bone structure being laid down, the rest is excreted (Rec. 506).

Defendants further showed that fluoridation of water supply is safe and practicable (Rec. 563-574); that fluoridation in one part per million causes a 65% reduction in the incident of tooth decay in children up to the age of ten years (Rec. 653-654); also that there is some direct benefit to adults (Rec. 654); that fluoridation of public water supply in one part per million has been endorsed by the St. Louis Medical Society (Rec. 572), also the meeting in St. Louis of the house of delegates of the Missouri State Medical Association (Rec. 576); the Missouri Department of Health and Welfare (Rec. 650), Commissioner of Health of St. Louis County (Rec. 672), the Council of St. Louis Dental Society, twelve in number, although the total membership of 941 had no chance to vote on the measure (Rec. 616-618); and also other scientific societies and authorities have approved it (Rec. 503).

The chief witness for the defendants, Dr. D. R. Van Wyngarden, however, testified that 10 to 12% of the children using fluoridated water, would be harmed, using one part per million (Rec. 682 to 684).

DECISION OF THE TRIAL COURT.

The trial court held on the facts of this case that the ordinance if enforced would constitute mass medication; that there were other available methods for those desiring fluoridation; that tooth decay is not infectious or contagious; that there was here no "pressure of great dangers"; that this ordinance is unconstitutional and void under the provisions of both the Constitution of the United

States and the Constitution of the State of Missouri (Rec. 739-754; 760-775; Rec. 780-792; also Appendix B., p. 53).

Among other findings, **the trial court found that the plaintiffs will be compelled to drink the water because there is no other practical source of supply other than from the St. Louis County Water Company** (Rec. 742, 743; Rec. 782, 783); that persons drinking the water will receive compulsory "treatment" for dental caries, which is not contagious or communicable in any way and in no way endangers the public health in the sense that its existence in the teeth of one individual might adversely affect the personal health of any other individual (Rec. 742, 743; Rec. 782, 783); the Court also found that fluorides are readily obtainable by prescription for topical application to teeth and for use in milk, water and salts (Rec. 742; Rec. 782).

The Court in its conclusions of law noted that such fluoridation would be forced medication or medical treatment forbidden by the tenets of certain churches or religious sects, and consequently an ordinance such as Ordinance No. 01480, violated the right of free exercise of religion (Rec. 744, Rec. 784).

The trial court distinguished cases from other states as not being in point, because "Here, as alleged by plaintiffs, we have a County Council acting under a charter form of government which has passed an ordinance attempting to regulate the distribution of water and to fluoridate same not only in the unincorporated areas where the Council no doubt has jurisdiction, but also in those municipalities which are separate entities and wherein the Council of St. Louis County does not have any jurisdiction under its charter" (Rec. 745, 746; Rec. 785).

Further, the trial Court held that the case at bar was distinguishable from the other cases because the Missouri

legislature gave "the Public Service Commission of said state the jurisdiction over all water companies and the power to prescribe rules and regulations as well as defining specifically by said rules and regulations what said water companies may or may not add to their water distribution system (Laws of Missouri, 1949, Public Service Commission, Sections 393.130, 140 as well as Sections 386.240, 250, 310 (Rec. 746; Rec. 785, 786)." (Appendix K sets out Section 386.250, subsections 7 and 9, p. 75).

The trial court found Ordinance No. 01480 unconstitutional and void "in that said ordinance attempts to order a privately owned company to fluoridate its entire water system when some of the users of said water, and specifically plaintiffs being residents and taxpayers in incorporated areas have had no opportunity to vote upon the measure of fluoridation, such an order being in direct violation of Article VI, Section 18 (c) of the Missouri Constitution" (Rec. 747, Rec. 786); * * * which "clearly requires a vote of the majority of the qualified electors thereon in municipalities or subdivisions prior to a county (charter form of government—St. Louis County) performing any of the services and functions of any municipality" (Rec. 748, Rec. 787).

The trial court held that the said ordinance is likewise "in violation of Article III, Section 22 of the charter of St. Louis County, which provides the manner in which the County shall perform any of the services and functions of any municipality and requires an acceptance by a vote of a majority of the qualified electors voting thereon in said incorporated municipality. Article III of St. Louis County's charter was enacted pursuant to and in conformity with the aforesaid Article VI, Section 18 (c) of the Missouri Constitution and the Court therefore holds that said ordinance deprives plaintiffs of 'life, liberty and property without due process of law', and is in violation

of the Fourteenth Amendment of the Constitution of the United States and is therefore void and unconstitutional" (Rec. 748, Rec. 787).

The trial court likewise held that "plaintiffs, would be **compelled** to **consume fluoridated** or **treated water.** The liberty, therefore, that plaintiffs are deprived of might be said to be that decision that they should be free to make as to whether they desire to apply fluorine to their teeth for the purpose of preventing tooth decay or not" (Rec. 749, Rec. 787, 788).

The trial court further held that—(Rec. 750; Rec. 788) "Any regulation or measure directly affecting the person in his bodily liberty or integrity represents the most incisive exercise of the police power. This Court adopts the reasoning of Mr. Justice Harlan of the United States Supreme Court when he stated in Jacobson v. Massachusetts, 197 U. S. 11:

> 'Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint **under conditions essential** to the **equal enjoyment** of the **same right by others.** It is, then, liberty regulated by law. There is, of course, a sphere in which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, **under the pressure of great dangers,** be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the **general public** may demand.' (Emphasis supplied.)

"Now, can it be said that the 'fluoridation ordinance', being an infringment of the individual's constitutional right of freedom of choice in matters relating to his own bodily care and health is justified by 'conditions essential to the equal enjoyment of the same right by others' or can it be justified by 'pressure of great dangers' to the public health?"

Continuing, the trial court held (Rec. 752, Rec. 790):

> "Defendants would readily admit that an ordinance requiring every resident or child under fourteen years of age to present himself or herself for topical application of fluorides by public health authorities would be unconstitutional. However, is the fluoridation ordinance, under attack by plaintiffs, any different? If the children under the age of fourteen could not be compelled to present themselves one by one to the health authorities for such topical application of fluorides, how could the County Council by the ordinance in question indirectly force the residents of this County to do 'en masse' what the Council could not compel each individual to do—submit himself for individual treatment? * * * Again the 'pressure of great dangers' that Justice Harlan referred to as being present when the rights of an individual must be subjected to the safety of its members by reasonable regulation and restraint **as the safety of the general public might demand, is just not present and it can't be found under the evidence submitted to this Court.** (Emphasis supplied.) The ordinance, therefore, is invalid and unconstitutional as an unwarranted and unjustified invasion of the liberty as guaranteed plaintiffs and others under Section 1 of the Fourteenth Amendment of the United States Constitution" (Rec. 752, 753, 754; Rec. 790, 791).

In the Supreme Court of Missouri the appellants here continued to urge that the said ordinance violates the

First Section of the 14th Amendment, and also the First Amendment to the Constitution of the United States, as well as the decisions of this court.

The Supreme Court, however, brushed aside the said arguments and held the ordinance constitutional (Rec. 794-813, l. c. 807).

The decision of the Missouri Supreme Court is untenable.

The Supreme Court in its opinion admitted (Rec. 797): "It is apparent that respondents' position is correct if the council's power in the premises is derived solely from Article VI, Sec. 18 (c) of the Constitution, and Article III, Sec. 22 (20) of the County Charter."

The Supreme Court then goes on to state—(Rec. 797): • • • "St. Louis County may also exercise the powers pertaining to the public health validly conferred by the state upon counties of the first class. Article IV, section 37, of the Missouri Constitution declares that 'The health and general welfare of the people are matters of primary concern' and the general assembly shall establish a department of public health and welfare and may grant power with respect thereto to counties, cities, or other political subdivisions of the state. The legislature, as directed, established a department of public health and welfare and, among others, enacted Section 192.300, R. S. Mo. 1959" (Rec. 798) (set out in Appendix J attached hereto, p. 74), "which provides in part: 'The county courts of the several counties of class one are hereby empowered and permitted to make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county, • • • • "

The Supreme Court also relied on Article I, Section 2 of the County Charter (Rec. 798), which provides: "The County shall have all the powers now or hereafter vested

by the Constitution and laws of Missouri in county courts, county offices, counties of the first class, counties having the population or assessed valuation of taxable property of St. Louis County, Missouri, and counties of any other class in which St. Louis County may hereafter be includable, and all the powers provided in this Charter, and all other powers that are necessarily implied under the powers so granted.'" (Emphasis added.)

Based on the "constitutional, statutory and charter provisions last above set forth" (i. e., Article IV, Section 37 of the Missouri Constitution; Sect. 192.300, R. S. Mo. 1959; and Article I, Sec. 2 of the St. Louis County Charter), the Supreme Court of Missouri then holds that "the county council was and is authorized to enact ordinances tending to enhance the health of all the residents of St. Louis, irrespective of whether they also reside within a municipality" (Rec. 798).

The Court further said, "Assuming, then, for the present that the ordinance in question is one which was intended to and which does tend to enhance the public health, a question we shall later discuss, we hold that the county council had the authority and the power to enact such an ordinance applicable county-wide and, consequently, that the ordinance does not violate Article VI, Section 18 (c) of the Missouri Constitution or Article III, Section 22 (20) of the St. Louis County Charter" (Rec. 798).

The appellants respectfully submit that the ruling of the Supreme Court of Missouri is in error because Section 192.300 pertains to counties and county courts, and St. Louis County has no county court, but instead has a county Council operating under the provisions of the Home Rule Charter of St. Louis County, and Article I, Section 2 of said Home Rule Charter is a **general section**, defining in general the powers which St. Louis County will have under its charter, whereas **the powers conferred upon the**

County Council are outlined and set forth elsewhere in said Home Rule Charter, to-wit, in Article III (Appendix G, p. 71).

Furthermore this statutory provision could not possibly override Article VI, section 18 (c) of the Missouri Constitution. The powers of the County Council as to public health are limited to the **unincorporated areas** in the County.

Section 18 (a) of Article VI of the Missouri Constitution authorizes counties of more than 85,000 inhabitants to frame and adopt a charter for its own government. St. Louis County had at the time of the adoption of the Home Rule Charter, a population of over 400,000 inhabitants and adopted the above described Charter.

The result of the Missouri Supreme Court's ruling here would be to **nullify Article VI, Section 18 (c)** of the Missouri Constitution, and **Article III, Sec. 22 (19, 20 and 24) of the St. Louis County Charter**, and thus to nullify vested Constitutional rights under the first section of the Fourteenth Amendment of the Constitution of the United States by denying these appellants and all others similarly situated in St. Louis County due process of law and the equal protection of the laws.

The Missouri Supreme Court itself has held that the county court is not the same as the county council under a different name. **Schmoll v. Housing Authority of St. Louis County**, 321 S. W. (2d) 494, where the court expressly held, furthermore (l. c. 498), that having become a charter county, "its charter became its fundamental organic law and the County Council is obliged to look to the charter for its powers, and acts beyond the powers granted or necessarily implied are void" citing **State ex rel. Town of Olivette v. American Telephone & Telegraph Company**, 280 S. W. 2d 134, 137-138.

How can the Missouri Supreme Court consistently declare the law in this way in the Schmoll case and now hold in the case at bar that the County Council had authority to disregard its charter powers? We submit that the voters in the incorporated areas had the undoubted right at least to vote on the issue.

In the case of **Charles W. Baker et al. v. Joe C. Carr et al.**, decided by this Court on March 26, 1962 (see U. S. Law Week, Vol. 30, No. 37, p. 4203), which was a redistricting case, and in which this Court considered the right of the electors to vote, this Court held that the failure to permit them to exercise their right to vote debased their votes, and denied them the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States.

The facts in the case at bar are even stronger than those in the Baker case for the reason that in the case at bar the County Council, consisting of seven members, have undertaken to legislate on a matter and in an area over which they have no jurisdiction and no authority, and in doing so have deprived the electors in the incorporated areas and municipalities of St. Louis County of their right of suffrage given to them by the Missouri Constitution, as well as the Home Rule Charter of St. Louis County.

In the Baker case this Court recognized "a citizen's right to a vote free of arbitrary impairment by state action", citing U. S. v. Classic, 313 U. S. 299. This Court further stated, "They are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes' ", citing Coleman v. Miller, 307 U. S. at 438, "not merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law * * *' ". Also, " 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an in-

jury' ", citing Marbury v. Madison, 5 U. S. (1 Cranch.), 137, 163.

In the case at bar, following a resume of the evidence, the Missouri Supreme Court states: "It is apparent * * * that the question whether over-all harm or over-all benefit will result to individuals who consume water containing the fluoride ion in a concentration of one part fluoride to one million gallons of water is highly controversial and that there is substantial evidence to support a conclusion either way" (Rec. 803).

The Supreme Court finds that the ordinance bears a reasonable relation to public health and "that its provisions are designed to and reasonably will tend to enhance the public health and, therefore, that the action of the St. Louis County Council, in enacting the ordinance in question, was an exercise of the power conferred by Section 192.300, supra" (Rec. 803).

Next, it considers "whether the ordinance unduly invades or infringes rights guaranteed by the state and federal constitutions" (Rec. 803).

It holds (Rec. 803-805) that there is not before the court the question of the violation of respondents' or others' freedom to believe and practice the tenets of their religious belief or involving the violation of any other First Amendment right, the Supreme Court thus brushing aside the brief filed by the amicus curiae, which was adopted by these appellants, and which urged that fluoridation would be forced medication or medical treatment forbidden by the tenets of certain churches or religious sects, and consequently an ordinance such as the one in the case at bar, violated the right of free exercise of religion. The Supreme Court said (Rec. 804, 805), "Even if we should take judicial notice that the belief suggested by counsel is a religious belief of Christian Scientists, still we should

not know whether, nor could we assume that, it would violate that belief for one to consume water which theretofore had contained one-half part fluoride, simply because another one-half part had been added;" the Supreme Court evidently overlooking that part of the record, including the testimony of an eminent biochemist (Rec. 359-447) Dr. W. A. Albrecht, showing the difference between natural or calcium fluoride which is found in some places in water, and sodium fluoride which is manufactured and added to water in fluoridation programs, and which has an entirely different chemical reaction and is much more dangerous; and overlooking the fact that forced medication by fluorides is objectionable because dangerous to a large segment of the people, which includes Christian Scientists, and overlooking the fact that medication is medication irrespective of one's religious belief, and that forced medication is undesirable to these appellants as shown by the record and as pleaded in plaintiff's petition (Rec. 6, 46).

Section 192.300, R. S. Mo. 1959, which the Missouri Supreme Court says applies, does not apply to the case at bar. Otherwise, we would have one constitutional provision requiring a vote of the electors in incorporated areas, and having another contitutional provision diametrically opposed to the same. Such is not the case, and was certainly never intended by the framers of the Missouri Constitution of 1945.

It is noteworthy that the Supreme Court (Rec. 809) stated that it was not concerned with the expediency of the ordinance or with the wisdom of the Council's action in enacting it; although the Court recognizes that there is a very real compulsion (Rec. 810) for many from a practical standpoint to drink the fluoridated water when the only apparent ways to avoid drinking public water and to avoid consuming the artificial fluorides added to it are, for many prohibitively expensive or unduly burdensome.

In answer to the argument of these appellants that Sections 196.125-196.145, R. S. Mo. 1959 (pleaded Rec. 8; also set out in Appendix I, p. 73), defines non-alcoholic drinks, and forbids the introduction therein of fluorides, the Supreme Court holds that (Rec. 812) carbonated beverages, sarsaparilla, ginger ale, soda water, lemonade, orangeade, root beer, grape juice, and other non-alcoholic drinks, mentioned in the statute do not include water, the Court overlooking the fact that water is the prime ingredient in all of these drinks.

The opinion ends by holding that the ordinance in question is not invalid for any of the reasons urged in the case as set out in the opinion.

Appellants respectfully submit that the opinion of the Supreme Court of Missouri militates against the federal constitutional and statutory provisions hereinabove discussed as well as the above decisions of this Court herein cited and discussed.

In the motion for rehearing filed in the Supreme Court of Missouri, the appellants here again urged that the Missouri Supreme Court misconstrued Ordinance No. 01480 passed by the St. Louis County Council in holding that it does not violate Section I of the 14th Amendment to the Constitution of the United States (Opinion of Sup. Ct. of Mo.), as well as Art. I, Sec. 10 of the Missouri Constitution (Rec. 816 et seq.).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The decision of the Supreme Court of Missouri is far-reaching in its extent and is a matter of great importance to the public and to the public interests all over the United States.

The questions have not been passed upon by this Court, in connection with fluoridation of public water supplies,

but the question of fluoridation has been and is presently up for consideration in many states and even in foreign countries. Some areas have fluoridated the public water supply and have since discontinued the practice. Other areas are now fluoridating, and still other areas have under consideration the question of whether to fluoridate the public water supply. The question of fluoridation has been considered in a number of state court decisions. Where the decision has been in favor of fluoridation, the issue of harm to the general public was not raised nor was there evidence of harm introduced.

See article in the American Bar Journal (May 1960, Vol. 46, page 523) sustaining the position of appellants in this Court.

In the case at bar, the question of harm was before the court, appellants contend that fluoridation of public water supplies is a wasteful procedure; dangerous to the health of a large segment of the people; that it is impossible to control the dosage in the public water supply; it is the further contention of appellants that the introduction of fluoride into the public water supply amounts to mass medication and is violative of the 14th Amendment to the Constitution of the United States, and denies due process and equal protection of the law, is arbitrary, unreasonable and harmful, and is also violative of freedom of religion guaranteed by the First Amendment to the Constitution of the United States, and violates the Missouri constitutional and statutory provisions above set out.

Article I, Section 10 of the Missouri Constitution, like the 14th Amendment to the Constitution of the United States, provides for due process. It is the contention of the appellants that a violation of due process under Article I, Section 10 of the Missouri Constitution, constitutes also a violation of the 14th Amendment to the Constitution of the United States, just as a violation of Sec-

tion 1983 of 42 U. S. C. A. is violative of Section 1 of the said 14th Amendment, since Section 1 of the 14th Amendment operates on said Section 1983.

So far as we have been able to ascertain, in only two cases have there been **appeals** taken to this Court in fluoridation cases, to-wit, the case of **Chapman v. Shreveport**, 225 La. 859, 74 S. (2d) 142, 348 U. S. 892, 75 S. Ct. 227, 99 L. Ed. 701; and **Kraus v. City of Cleveland et al.**, reported at 163 Ohio 559, 127 N. E. 2d 609, appeal dismissed by this Court, **351 U. S. 935**, 76 S. Ct. 833, 100 L. Ed. 1463, both cases were dismissed by this Court for want of a substantial federal question.

There are at least 4 distinctions between those cases and the case at bar:

(1) The City Council had authority from the City of Shreveport to fluoridate the water;

(2) There was no evidence introduced to show the harmful effects of fluoride on human beings;

(3) There was no evidence to show that sodium fluoride, which is artificial, and which is a by-product of industry, is eighty times more dangerous than calcium fluoride which is found in nature;

(4) In neither of those appeals was the question of the right of the public to vote on the proposition an issue.

In the Chapman case the record showed that the fluoridation of communal water supplies was in an experimental stage, that no tests had been made, and there was no evidence before the Court of the harmful effects of fluoridation, and therefore there was no evidence of a violation of the constitutional rights of the population. The evidence was in the form of affidavits and statements of witnesses. This Court dismissed the appeal for want of a substantial federal question.

In the trial of the Kraus case, supra, which is reported in **116 N. E. (2d) 779**, it was stipulated under "Facts Agreed upon by the Parties" (l. c. 785), that (l. c. 788):

> "11. The said inorganic fluoride chemicals to be introduced into the drinking water of the City of Cleveland will not, and are not intended to have any effect on the potability, palatability or purity of the drinking water of the City of Cleveland."

In the trial court's opinion, l. c. 793 (2nd column, line 16), it was stated:

> "These objections are not based upon the claims that the program will cause injury."

The opinion of the Supreme Court of Ohio, therefore, was based upon the right, which was not challenged, of the City Council to enact legislation on fluoridation, and on the fact which was also agreed, that fluoridation was not harmful; **while in the case at bar there was no legal authority in the County Council of St. Louis County to enact such legislation, and the plaintiffs pleaded and proved a number of adverse physiological effects of fluoridation upon human beings.**

This Court dismissed the appeal in the Kraus case May 21, 1956. Much progress has been made in the study of fluoridation since that time, showing harmful effects, and much scientific evidence has been adduced, on the dangers of introducing fluorides into a public water system, since the said dismissal.

In two other cases, certiorari was denied by this Court for obvious reasons (improper application, and no evidence offered to show the deleterious effects of introducing fluoride into drinking water):

Dowell v. Tulsa (1954), 273 P. (2d) 859, 348 U. S. 912, 75 S. Ct. 292, 99 L. Ed. 715;

C. Leon de Aryan v. Butler, Mayor of San Diego, 119 C. A. (2d) 674, 260 P. (2d) 98, Cert. denied 347 U. S. 101 2, 74 S. Ct. 863, 98 L. Ed. 1135. In this case the matter became moot, because San Diego decided not to fluorinate.

CONCLUSION.

Appellants respectfully suggest that this appeal brings before this court federal questions under the constitution that are far-reaching and important, both in terms of legal principles and practical impact upon the public throughout the nation; the ordinance is unreasonable, oppressive and arbitrary in that it denies plaintiffs the right to vote on the question of the use of fluoride in the communal water supply, which definitely has a harmful effect on part of the population; it violates their constitutional rights as set out herein, and therefore the questions presented are so substantial as to require full consideration, with briefs on the merits, and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of Missouri, entered December 11, 1961, in Cause No. 48,453.

In the Supreme Court of Missouri.
Division Number One,
September Session, 1961.

Dagmar Readey, Edward L. Glauert, Hiram Schmedel, Chris J. Muckerman, Henry J. Johnson, Robert Burkham, Mignon E. Dietrich, and Jack Welch, Jr., Respondents,

vs.

St. Louis County Water Company, a Corporation, Defendant,

and

Thomas C. Dunne, Maurice M. Abramson, John J. Dowling, Richard A. Hetlage, Russell A. Grantham, George E. Bohrer, John F. Molloy, Members of the County Council of the County of St. Louis, Missouri; Edward A. Walsh, County Clerk of St. Louis County, Missouri; Dr. C. Howe Eller, Acting Health Commissioner of the County of St. Louis, Missouri, and Successors in Office, Appellants.

No. 48,453

Appeal from the Circuit Court of St. Louis County.

Honorable Douglas L. C. Jones, Judge.

In June 1959 the St. Louis County Council enacted an ordinance which directed the St. Louis County Water

Company to introduce a sufficient quantity of the fluoride ion into the water it furnished county consumers to maintain throughout the distribution system a fluoride concentration of approximately one part fluoride per million gallons of water, and which directed the Water Company to make certain tests and keep certain records, and which directed the county health commissioner to make periodic reports to the council on the fluoridation of the water supply and to arrange for surveys and research into the beneficial effect of the program.

Respondents are eight resident taxpayers of St. Louis County and are consumers of water distributed by the Water Company, some of whom resided in various municipalities within the county. They brought an action against the Water Company, the then members of the county council, the county clerk, and the acting county health commissioner, to enjoin the enforcement of the ordinance for the averred reason that it was invalid in that it violated stated provisions of the federal and Missouri Constitutions and provisions of specified state laws.

At the close of respondents' evidence the trial chancellor sustained Water Company's motion to dismiss and there has been no appeal from the ensuing judgment of dismissal. At the close of all the evidence the trial chancellor enjoined the remaining defendants below from enforcing the ordinance for the stated reason that it was void in that it violated provisions of the state and federal constitutions in the respects to be hereinafter noted.

Those defendants have appealed and contend that the trial court erred for the reason that the ordinance is a valid exercise of the county council's police power to promote the public health. Respondents here seek to support the trial court's ruling for the stated reasons that the ordinance is unconstitutional in that it violates the Fourteenth Amendment to the Constitution of the United

States and Article I, Section 10 of the Missouri Constitution in that it unduly infringes their and other county residents freedom of choice in matters relating to bodily care and health by compelling them to drink fluoridated water against their wills; that the ordinance violates the First Amendment to the Constitution of the United States in that it subjects Christian Scientists living in St. Louis County to forced medication contrary to their religious beliefs; that the ordinance violates Article VI, Section 18 (c) of the Constitution of Missouri in that it applies to the entire county, including the county municipalities, and therefore its enactment was beyond the power of the county council; and that the enforcement of the ordinance would violate Missouri statutes relating to the adulteration and misbranding of nonalcoholic drinks.

Inasmuch as the validity of the contention that the ordinance violates Article VI, Section 18 (c) of the Missouri Constitution, depends on the question whether the council had the power and authority to have enacted any ordinance purporting to deal with matters relating to the public health of persons residing within county municipalities, and inasmuch as an affirmance of the trial court's ruling on that question would be dispositive of the case, we shall first consider that contention.

The ordinance in question contemplates, and its enforcement would involve, the addition of a quantity of the fluoride ion to all of the water leaving Water Company's purification plant and such water is sold to consumer residents of St. Louis County who live both within and without incorporated areas of the county, and the water so furnished is, for all practical purposes, the only water available to county residents.

Article VI, Sections 18 through 20, 1945 Missouri Constitution, authorizes special charters for the government of certain counties and authorizes the inclusion of speci-

fied provisions in those charters. Section 18 (c) is: "The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county shall perform any of the services and functions of any municipality, or political subdivision in the county, except school districts, when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote." 2 V. A. M. S.

Pursuant to that constitutional authorization, St. Louis County's Home Rule Charter provided in Article III, Section 22 (20) that the council should have the power by ordinance "To exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the County outside incorporated cities, and on such other subjects as may hereafter be authorized by the Constitution or by law, provided that, until superseded by ordinances of the Council, the laws pertaining to said matters shall continue to be valid and effective." And Section 22 (19) provided that the council should have power by ordinance "To provide the terms upon which the County shall perform any of the services and functions of any municipality or political subdivision in the County, except school districts, when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision, which acceptance may be revoked by a like vote; and to cooperate and contract with the municipalities or political subdivisions in the County as otherwise authorized by this charter and by law."

It was the opinion of the trial chancellor and it is the contention of respondents here that the ordinance in ques-

tion violates the constitutional and charter provisions above set forth for the reason that the county council's power to enact public health ordinances was limited to the enactment of ordinances affecting only those areas outside incorporated cities. It is apparent that respondents' position is correct if the council's power in the premises is derived solely from Article VI, Section 18 ( ) of the Constitution, and Article III, Section 22 (20) of the County Charter. The fact is, however, that the county council's power in certain matters, including the enactment of ordinances which tend to enhance the public health, is not limited to the power conferred by Article VI, Section 18 (c) of the Constitution and set forth in Article III, Section 22 (20) of the County Charter. On the contrary, St. Louis County may also exercise the powers pertaining to the public health validly conferred by the state upon counties of the first class. Article IV, Section 37 of the Missouri Constitution declares that "The health and general welfare of the people are matters of primary public concern" and the general assembly shall establish a department of public health and welfare and may grant power with respect thereto to counties, cities, or other political subdivisions of the state. The legislature, as directed, established a department of public health and welfare and, among others, enacted Section 192.300, R. S. Mo. 1959, and 12 V. A. M. S., which provides in part: "The county courts of the several counties of class one are hereby empowered and permitted to make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county; provided such rules, regulations and ordinances shall not be in conflict with any rules or regulations authorized and made by the division of health in accordance with this chapter."

Article I, Section 2 of the County Charter provides: "The County shall have all the powers now or hereafter vested by the Constitution and laws of Missouri in county courts, county offices, counties of the first class, counties having the population or assessed valuation of taxable property of St. Louis County, Missouri, and counties of any other class in which St. Louis County may hereafter be includable, and all the powers provided in this Charter, and all other powers that are necessarily implied under the powers so granted."

It appears, therefore, that by virtue of the constitutional, statutory, and charter provisions last above set forth, the county council was and is authorized to enact ordinances tending to enhance the health of all the residents of St. Louis County, irrespective of whether they also reside within a municipality. See State ex rel. Shepley v. Gamble, Mo., 280 S. W. 2d 656.

Assuming, then, for the present that the ordinance in question is one which was intended to and which does tend to enhance the public health, a question we shall later discuss, we hold that the county council had the authority and the power to enact such an ordinance applicable county-wide and, consequently, that the ordinance does not violate Article VI, Section 18 (c) of the Missouri Constitution, or Article III, Section 22 (20) of the St. Louis County Charter.

It should be here noted that there is no claim or contention that in enacting the ordinance the county council acted arbitrarily or without sufficient investigation or upon insufficient knowledge, nor is there any contention that there was any procedural irregularity with respect to the enactment of the ordinance in question. Even though there is no showing in the present record as to what information the council had upon which it based the exercise of its legislative power in enacting the ordinance, in the absence

of any contention as to insufficiency of information and in the absence of any claim of procedural irregularity, we should and do assume that the council had the information and knowledge which the evidence in the present record affords.

As we have heretofore indicated, there is no dispute about the fact that, generally speaking, a resident of St. Louis County, whether within or without a municipality, must use water supplied by the Water Company (although the evidence does show that the City of Kirkwood, a municipality within the county, had been fluoridating its water for a period of two years prior to the trial, but the record does not show whether Kirkwood's water is from some other source or whether that city further treats water which it purchases from the Water Company). Further, there is no dispute about the fact that the Water Company obtains the water it supplies from the Missouri River and that such water as it is taken from the river contains an average of .5 part of the fluoride ion per million gallons of water, and that such fluoride content is not removed from the water, but remains in it, anqd thus that the Water Company, irrespective of the ordinance, furnishes water fluoridated to the level of one-half part fluoride to each one million gallons of water; so that the effect of the ordinance is to require the Water Company only to supplement the existing concentration of fluoride by adding one-half part per million gallons in order that there will be a total of one part fluoride per million gallons of water.

It appears also that there is no dispute about the facts that the fluoride ion in water acts upon the individual who drinks the water rather than upon the water as such as a purifying agent, and, consequently, the ordinance requirement for an additional amount of the fluoride ion is for the purpose of affecting the dental health of each individual who consumes the fluoridated water; and that dental caries

or tooth decay is not a contagious or communicable disease and cannot produce an epidemic.

Respondents adduced evidence, including the opinions of apparently well-qualified experts, tending to establish the proposition that the ingestion of water containing any fluoride is harmful to the individual consuming it, and that water containing one part fluoride to a million gallons of water is harmful in many ways. That evidence tended to show that ten to forty per cent of children between the ages of 5 and 13 who consume water fluoridated one part to a million will have disfigured teeth, including mottled or discolored enamel; that older people consuming such water will suffer from gastrointestinal disturbances, including nausea, vomiting, constipation and diarrhea; that they will also sustain damage to the liver and kidneys and, under some circumstances, to other vital organs such as the aorta, and suffer abnormalities in bone growth and bone structure; that pregnant women consuming such water will sustain injury and bear children whose teeth will show later damage; that certain people, as a result of drinking such water, develop arthritic changes in the lower spine, neuromuscular changes in the arms and legs, partial palsy of the arms and legs, abnormal reflexes, severe headaches and extreme weakness.

Respondents' evidence tended to show further that fluorine is not an essential element of the human body and that all chemicals bearing the fluoride ion are insidious poisons and are cumulative in the human body; that due to the fact that different people drink different amounts of water and the same person consumes different amounts of water depending upon the time of year and for other reasons, it is difficult, if not impossible, to control the amount of the fluoride ion ingested by a particular individual when a specified amount is introduced into a public water supply; and that there are methods other than the addition of the

fluoride ion to the public water supply by which fluorine may be applied to the teeth, such as an application by a dentist directly on the teeth, or by fluoridating an individual user's water supply by dissolving tablets therein.

Appellants adduced evidence, including the opinions of apparently well-qualified experts, tending to establish the proposition that fluoridation of water as proposed by the ordinance in question would result in harm to no one, but, on the contrary, would be highly beneficial to the residents of St. Louis County in that it would reduce dental decay in children up to 14 years of age by as much as sixty-five per cent by means of hardening the enamel on their teeth, and that this same reduction in decay would accrue to older age groups provided the members of those groups had drunk the fluoridated water from birth. Appellants' evidence substantially supported the conclusions: that there is phenomenal agreement among professional and scientific groups in the United States and in the world that fluoridation of public water supplies in the amount provided by the ordinance in question is of great significance in terms of general health, in producing a dental caries resistant enamel on teeth; that "Dental decay is recognized as man's most widespread chronic disease. Few persons escape. No social stratum or age group is immune. A decayed tooth never heals by itself, by prescription or by advice. About 97,000,000 people in the United States have decayed teeth requiring treatment"; that fluoridation of water is safe, practicable, not unduly expensive as a health measure, and is efficacious. Appellants' evidence tended to show further that the harmful effects suggested by plaintiffs' evidence would not occur and the testimony of one of appellants' witnesses was that he practiced dentistry in Kirkwood (a municipality in St. Louis County) where the water supply had been fluoridated since January 1, 1958, and that he had observed no harmful effects; that dental fluorosis or mottling of the enamel on teeth occurs to an appreciable

extent only when there is an excessive amount of fluoride in the water, that is, in excess of two parts fluoride per million gallons of water.

The evidence also established that fluoridation of public water supplies to the extent provided in the ordinance had been endorsed by the St. Louis Dental Association, the Missouri State Dental Association, the American Dental Association, the American College of Dentists, the Missouri Public Health Association, the American Public Health Association, the Missouri State Department of Health, the United States Department of Health, Education and Welfare, the St. Louis Medical Society, the Missouri State Medical Association, the American Medical Association and the St. Louis County Health Department; that there are twenty-five communities in Missouri now fluoridating their water supplies to approximately one part per million; that at trial time there were 1,134,000 people in Missouri drinking artificially fluoridated water to the extent of one part per million gallons; and there were 109,000 people drinking naturally fluoridated water in various amounts; for example, in Columbia, Missouri, the natural fluoride content is 1.32 parts fluoride per million gallons of water; that Army, Navy and Air Force installations where children are in residence furnish fluoridated water.

Appellants' evidence tended to show further that water fluoridated as the ordinance required is nonpoisonous; that toxicity will occur only at concentrations 20 to 50 times as great as that proposed by the ordinance; that while applying fluorine directly to the teeth is satisfactory for each individual who receives the treatment, it is not a practical method because there are not enough dentists to effectively accomplish the task; that dental decay occurs at a rate six per cent faster than available dentists can repair it; that fluoridation in the manner proposed is not mass medication but is, in effect, prevention rather

than treatment; that chlorine is added to water to cut down bacterial contamination in order to reduce the occurrence of infectious disease, such as typhoid fever, and fluoride is added to prevent or deter the progress of a widespread dental disorder and thereby preserve the dental health of the people who consume the fluoridated water.

It is apparent from the foregoing resumé of the evidence that the question whether over-all harm or over all benefit will result to individuals who consume water containing the fluoride ion in a concentration of one part fluoride to one million gallons of water is highly controversial and that there is substantial evidence to support a conclusion either way. Our province, in the first instance, is to determine whether the ordinance in question bears a reasonable relation to public health and is thereby fairly referable to the county's police power. It appears to us that decisive of that determination is the fact that the record contains substantial evidence from which the county council reasonably could have found and concluded that dental decay is a widespread and serious disease affecting the dental health of all the people of St. Louis County; that a requirement that the fluoride content of the water consumed by St. Louis County residents be supplemented up to one part per million gallons would effectively and extensively decrease tooth decay, particularly in children, but with benefit to all; and that such a method would constitute a safe, practicable, relatively inexpensive, and efficacious public health measure.

We have no doubt, therefore, that the ordinance does bear a reasonable relation to public health and that its provisions are designed to and reasonably will tend to enhance the public health and, therefore, that the action of the St. Louis County Council, in enacting the ordinance in question, was an exercise of the power conferred by Section 192.300, supra.

We next consider whether the ordinance unduly invades or infringes rights guaranteed by the state and federal constitutions. Respondents contend that the ordinance is unconstitutional because it prohibits certain county residents from practicing their religious beliefs. That question is not before us for decision for the reasons which follow. There was no averment by plaintiffs in any pleading claiming any such violation, either directly or by inference. There was no averment that they or any of them are members or represent any members of a religious body or those who hold particular beliefs or practice their beliefs in a particular manner. Nor was there any such contention throughout the trial. There was no evidence offered or adduced pertaining to the tenets or practices of any particular religious body or group of people, nor was there evidence that members of any particular religious body resided in St. Louis County. There was no finding of fact or conclusion of law with respect to the contention now made and thus, of course, no part of the judgment was based upon any such finding or conclusion.

After the present appeal was pending in this court, leave was granted an attorney of the Missouri Bar to file a brief he ein as amicus curiae, on the averred ground, that the case was one which affected the interest and welfare of all the people of Missouri, including those residing in large metropolitan areas. The brief of amicus curiae contends, and that contention is specifically adopted by and included by reference as part of respondents' brief, that the ordinance in question is unconstitutional because it subjects Christian Scientists in St. Louis County to forced medication against their religious beliefs and thereby deprives them of their constitutional right under the First Amendment to the United States Constitution. It is suggested by inference that we may take judicial notice of the fact that it is a religious belief of Christian Scientists that no material applications for relief of dis-

case should be employed. But if, in the public interest, we should wish to resolve the question posed in amicus' brief, even though the constitutional question was not raised below nor preserved for appellate review, and even if we should take judicial notice that the belief suggested by counsel is a religious belief of Christian Scientists, still we should not know whether, nor could we assume that, it would violate that belief for one to consume water which theretofore had contained one-half part fluoride, simply because another one-half part had been added. Furthermore, if we should assume that the fluoride ion in water constitutes medication as to the individual and if we should further assume that the ingestion of that medication violates a religious belief of any county resident, then it must follow that forced medication now exists and that the enforcement of the ordinance in question would not change the situation in that respect. Be that as it may, however, the fact is that we may not on this record decide whether anyone's religious beliefs or anyone's freedom to practice his religious beliefs would be unduly and unlawfully infringed by the enforcement of the ordinance.

Respondents and amicus curiae state their specific contention with respect to the claimed violation of the Fourteenth Amendment to the United States Constitution and of Section 10 of Article I of the Missouri Constitution in this manner: The ordinance is unconstitutional and void because it deprives plaintiffs and other residents of St. Louis County of their liberty in that it denies them freedom of choice in matters relating to bodily care and health by compelling them to drink water containing "the poisonous drug fluoride ion" against their wills when not justified by "pressure of great dangers" to the public health.

Inasmuch as there is before us no question involving the violation of respondents' or others' freedom to believe and practice the tenets of their religious beliefs or involving the violation of any other First Amendment right, it

is apparent that in so far as the federal constitution is concerned we are here dealing with the due process clause of the Fourteenth Amendment as applied "for its own sake" and not with the due process clause as an instrument for transmitting any specific prohibition of the First Amendment. That is to say, we are not here dealing with a freedom which has been said to occupy a "preferred place * * * in our scheme," i. e., those "freedoms secured by the First Amendment." West Virginia Board of Education v. Barnette, 319 U. S. 624, 639; Thomas v. Collins, 323 U. S. 516, 529, 530.

Respondents point out that the "word 'liberty' contained in that amendment [Fourteenth] embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well." (Bracketed insert ours.) Grosjean v. American Press Co., 297 U. S. 233, 244. They concede that their freedom to choose whether to consume water containing the fluoride ion as a preventative to deter the decay of an individual's teeth is subject to regulation by law but contend that one's constitutionally protected freedom may be lawfully infringed only when such is necessary to insure the equal enjoyment of the same right or freedom by others or "under the pressures of great dangers." They rely upon language contained in the memorandum opinion of the trial chancellor who, in turn, stated those "tests" on the authority of Jacobson v. Massachusetts, 197 U. S. 11. In that case the court upheld the validity of a state compulsory vaccination law. It is true that the court at one place in its opinion quoted this from another case (197 U. S. 26, 27): " 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according

to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.'" And at another place in the opinion (197 U. S. 29) the court, in pointing out that it was "the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few," pointed out further that to conserve the safety of members of society, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." But the court in the Jacobson case in the course of its opinion also said: "If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. * * *

"Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution." 197 U. S. 31.

In our view the Jacobson case does not support the proposition that individual freedom of choice pertaining to a matter affecting the public health, such as the freedom of choice here asserted, may be validly restricted or infringed only where the restraint imposed is necessary in order to insure equal enjoyment of the same freedom by others or under the "pressure of great dangers"; nor does that case stand for the proposition that only when

necessary to protect the individual as well as the members of the general public from the danger of a communicable or contagious disease may a legislative body validly enact an ordinance interfering with the freedom of choice of the individual as to a matter affecting the public health.

The United States Supreme Court has made it clear that even in cases involving First Amendment prohibitions which occupy an exalted and preferred position in our scheme of things it will not indiscriminately apply the "clear and present danger" test stated in Schenck v. United States, 249 U. S. 47. That court adopted the interpretation of that phrase suggested by Chief Judge Learned Hand. In Dennis v. United States, 341 U. S. 494, 510, the court, speaking of the phrase "clear and present danger," said: "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." And see Baer v. City of Bend, Ore., 292 P. 2d 134, 139, 140, where the Oregon Supreme Court in a well-reasoned opinion held that the effect of the fluoridation of a public water supply did not infringe the consumer's constitutional guarantee of religious liberty.

It seems to us that the language of the court in West Coast Hotel Company v. Parrish, 300 U. S. 379, is apropos in determining whether the due process clause of the Fourteenth Amendment has been violated under the facts here. There the court, in dealing with the question whether there had been a deprivation of freedom to contract by the enact-

ment of a minimum wage regulation for women, said at page 391: "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, **and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.**" (Our emphasis.)

Missouri cases hold that Article I, Section 10 of our Constitution ("That no person shall be deprived of life, liberty or property without due process of law") is not violated by an ordinance which, as we have held the one in question to be, is fairly referable to the police power of the enacting body and which is shown to have been enacted for the protection and enhancement of the public health and general welfare of the inhabitants of the area in question, unless its provisions are unreasonable and the burden is upon the one asserting the ordinance's invalidity to overcome the legal presumption of validity which attends the ordinance. Passler v. Johnson, Mo., 304 S. W. 2d 903, 908 [3-7].

Respondents' evidence tended to show that the ingestion of any amount of fluoride ion is harmful, that consuming water which contains any amount of the fluoride ion constitutes medication, and that there is no difference between the fluoride ion existing in the Missouri River water as it is now distributed by the Water Company and the inorganic fluoride ion which would be placed in the water under the ordinance requirement. Thus it is clear that

this freedom of choice which respondents assert is not the freedom to choose not to ingest any fluoride (they say, medication) because they are now consuming and, apparently, irrespective of the ordinance, will continue to drink water containing one-half part fluoride to each million gallons. Thus, the freedom of which respondents speak can be only the freedom to choose not to ingest more fluoride (more medication) than they are now consuming by drinking water which contains an additional one-half part fluoride to each million gallons of water. It is true that respondents' evidence tended to show that the greater amount of fluoride in the water the greater the harm to the individual consuming it, so, admittedly, from respondents' standpoint, there is involved some "freedom of choice" but it is of the nature indicated.

We are not concerned with the expediency of the ordinance or with the wisdom of the council's action in enacting it. We again recognize that we are bound by the council's reasonable determination that the measure will result in benefit to each individual consumer and not in harm. We have held herein that the ordinance does bear a reasonable relation to public health and, based upon the council's conclusions, does tend to enhance the health of the residents of the county. Consequently, it appears that for us to hold the ordinance in question is in "palpable conflict" with the State or Federal Constitution we would need to find and rule that, although, as we have held, the ordinance bears a reasonable relation to public health and its enforcement would enhance the public health, nevertheless, the type and extent of the benefit accruing to each individual (prevention of dental decay) are such that each individual must be completely free to determine for himself whether he will accept the asserted benefit bestowed through the fluoridation of the public water supply, else his freedom of choice is unreasonably infringed. We correctly may not so hold. On the contrary, it seems to

us that the reasonably expectable and valuable benefit which the council determined would accrue to the community as a whole justifies the resulting infringement of the individual's freedom of choice. (We note, parenthetically, that we have assumed throughout that the enforcement of the ordinance would "compel" respondents and other residents to consume the fluoride ion. That is because we recognize that there is a very real compulsion for many from a practical standpoint when the only apparent ways to avoid drinking public water and thus to avoid consuming the additional fluoride probably are, for many, prohibitivgly expensive or unduly burdensome. The fact remains, however, that in considering the matter of undue or unreasonable infringement, it is well to recognize that the ordinance does not specifically require any individual water consumer to do anything.)

We are supported in our conclusion as to the ordinance by the opinions from each of eight appellate courts which have considered the questions involved in the fluoridation of public water supplies. It is true that there are distinguishing features in those cases. In some were fact stipulations which eliminated certain questions. In one of them, the Iowa case, the sole question was the power of a city to enact such an ordinance. On the whole, however, the opinions in the following cases are authority for the conclusion we have reached: Baer v. City of Bend, supra; Kaul v. City of Chehalis, Wash., 277 P. 2d 352; Kraus v. City of Cleveland, Ohio, 127 N. E. 2d 609; Dowell v. City of Tulsa, Okla., 273 P. 2d 859; De Aryan v. Butler, Cal. App., 260 P. 2d 98; Froncek v. City of Milwaukee, Wis., 69 N. W. 2d 242; Chapman v. City of Shreveport, La., 74 So. 2d 142; Wilson v. City of Council Bluffs, Iowa, 110 N. W. 2d 569.

Taking into account and consideration the relevant facts and circumstances, as we see them, we are of the view that we may not confidently say that the enforcement of

the ordinance in question would result in an undue or unreasonable infringement of respondents' protected freedom of choice under the due process clause of either the State or Federal Constitution.

Respondents contend also that the fact that their evidence indicated that there were other and, in their opinion, better ways to apply the fluoride ion to the teeth obviated the necessity for the fluoridation of the public water supply and thereby caused the ordinance to "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U. S. 479, 488. While, as we have pointed out heretofore, respondents did adduce evidence that fluorine could be applied to the teeth either topically or by dissolving tablets in individual water supplies, there was other evidence from which the council reasonably could have reached the conclusion that such methods would not effectively accomplish the purpose of the ordinance, that is, to benefit all by partially freeing each from the ravages of dental decay. It is suggested also that the ordinance benefits only a particular class, i. e., children up to 14 years, and it is contended that the ordinance is unconstitutional for that reason. While it is true the ordinance in question must be in the interest of the public generally as distinguished from the interest of a particular class, the evidence was such as justified the council in determining that the consumption of fluoridated water would benefit people of all ages. There was direct testimony to that effect and, of course, it is apparent that children become adults. Clearly, the council was justified in finding that the ordinance was in the interest of the county's entire population and not solely in the interest of a particular class.

Respondents contend further that the ordinance is in conflict with and violates Sections 196.125-196.145, R. S. Mo. 1959, and V. A. M. S. The cited sections define a nonalcoholic drink and then provide that such nonalcoholic

drinks shall not be adulterated or misbranded and prescribe a penalty for any violation. Respondents contend that water is a nonalcoholic drink and, inasmuch as Section 196.135, supra, provides that a nonalcoholic drink is adulterated when it contains any fluorides or fluorine compounds, the sections in question would be violated by the enforcement of an ordinance requiring the addition of a fluoride to water. We are of the view that respondents' contention in that respect is untenable. Section 196.125, 12 V. A. M. S., defines a nonalcoholic drink in these words: "the term 'nonalcoholic drink,' as used herein, shall include carbonated beverages of all flavors, sarsaparilla, ginger ale, soda water of all flavors, lemonade, orangeade, root beer, grape juice, and all other nonintoxicating drinks." It is clear enough to us that the legislature did not intend to include water within the expression "all other nonintoxicating drinks." Clearly, we think the legislature intended by that language to include other drinks popularly referred to as "soft drinks" which were not specifically named but which were of the general kind and nature as those listed. We so hold. See Dowell v. Tulsa, supra, 273 P. 2d 864 [11, 12]; Froncek v. Milwaukee, supra, 69 N. W. 2d 250, 251.

We are of the opinion that the ordinance in question is not invalid for any of the reasons urged, and it follows that the judgment is reversed and the case remanded with directions to enter a judgment in accordance with the views herein stated.

Cullen Coil, Commissioner.

Holman, C., Concurs.

Houser, C., Concurs.

Per Curiam: The foregoing opinion by Coil, C., is adopted as the opinion of the court.

All concur.

APPENDIX A-1.

Mandate and judgment and decree of the Supreme Court of Missouri, entered Dec. 11, 1961, in cause No. 48,453, reversing and remanding judgment of the Circuit Court of St. Louis County, Missouri, in Cause No. 230,189, with directions, filed in the Circuit Court of St. Louis County on January 25, 1962.

On the 11th day of December, 1961, the following proceedings were had and entered of record in said cause, to wit (caption omitted):

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of St. Louis County for further proceedings to be had therein, in conformity with the opinion of this court herein delivered; and that the said appellants recover against the said respondents costs and charges herein expended, and have execution therefor. (Opinion filed.)

APPENDIX B.

Opinion of the Circuit Court of St. Louis County, Missouri, including findings of fact and conclusions of law, and judgment, entered on July 5, 1960, in Cause No. 230,189.

State of Missouri,
County of St. Louis. } ss.

In the Circuit Court of the County of St. Louis,
State of Missouri.

Dagmar Readey et al.,
Plaintiffs,
vs.
St. Louis County Water Company et al.,
Defendants.
} Cause No. 230,189 Division No. 5

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Said cause having heretofore been tried by the Court, and the Court now having thoroughly investigated the many decisions rendered by various courts concerning the question in issue, to-wit: fluoridation, and now being fully advised under the premises, and having been requested to render in writing its findings of fact and conclusions of law as provided by the Revised Statutes of Missouri, the Court states as follows:

1. Although much evidence was adduced by both sides as to the advisability of fluoridating water the Court is of the opinion that it is of no consequence or importance whether he personally approves or disapproves of fluoridation, but is of the opinion that the only questions to be determined by this Court are those of a purely legal and constitutional origin, and so will be dealt with only from that standpoint.

2. Plaintiffs are citizens of the State of Missouri, some of whom reside in unincorporated areas and others in incorporated municipalities situated in St. Louis County, and as citizens and taxpayers of the County of St. Louis, State of Missouri, are likewise consumers of water distributed by the St. Louis County Water Company, and they have brought suit against the defendants by way of an injunction to restrain the said defendants from carrying out provisions of Ordinance 01480, which plaintiffs contend is both illegal and unconstitutional.

3. Defendants were originally the members of the County Council, the County Clerk and the Acting Health Commissioner of St. Louis County as well as the St. Louis County Water Company. However, on motion of the defendant, St. Louis County Water Company, to dismiss the petition as it applied to said Water Company, submitted to the Court at the close of plaintiff's case, said Court sustained said motion and the St. Louis County Water Company was dismissed as a party defendant to said cause of action.

4. Plaintiffs have attacked the legality of Ordinance 01480, which purports to direct the St. Louis County Water Company to introduce fluoride ion into the public water supply of St. Louis County in such quantities as are required to maintain throughout the pipe distribution system a fluoride concentration of approximately one part fluoride per million parts of water for the following reasons:

a) that the said ordinance is in violation of Article III, Section 22, of the Charter of St. Louis County and Article VI, Section 18 (c), of the Missouri Constitution,

b) that said ordinance is contrary to and in violation of Article I, Section 2 and Section 10, of the Missouri State Constitution in that it does not "promote the general welfare of the people," and that it further deprives plaintiffs of "life, liberty and property without due process of law,"

c) that the said ordinance likewise is in violation of the Fourteenth Amendment of the Constitution of the United States, Section 1, which is known in the vernacular as the due process of law section,

d) that said ordinance is in conflict with and militates against Section 386.250, paragraph 7, of the Revised Statutes of Missouri, 1949, which defines the jurisdiction of the Public Service Commission as to its powers and duties,

e) plaintiffs further attack said ordinance as being illegal and unconstitutional for many and various reasons which the Court will not take up at this time.

Findings.

Although this was a lengthy trial, which included much evidence adduced by both parties on this controversial subject of fluoridation as to the pros and cons of said project, suffice it to say that it can be concluded:

First, that the purpose for introducing fluorides in drinking water is to deter tooth decay; that said tooth decay known as "dental caries" is a very common disease of mankind but is neither infectious nor contagious; that the addition of said fluoride in the water supply is intended solely for use in prevention of tooth decay primarily in children up to fourteen years of age; that although fluoride is a deadly poison used commercially for the extermination of rats and other vermin, the addition to the water supply of a source of fluoride ion in the proportion of one part per million will not amount to a contamination of said water supply and perhaps it will still be as under the charter "clear potable water suitable for human consumption"; that fluoride has no effect upon the water or upon the plant life in the water but remains free and is artificially added solely for the effect it has on the individual drinking the water; that plaintiffs will be compelled to drink the water because there is no other

practical source of supply other than from the St. Louis County Water Company.

Second, that fluorides are readily available by prescription for topical application to teeth and for use in milk, water and salts.

Third, while dental caries may be termed a "disease which is prevalent in the teeth of almost everyone it is not contagious nor communicable in any way and in no way endangers the public health in the sense that its existence in the teeth of one individual might adversely affect the personal health of any other individual.

Fourth, that the use of the St. Louis County Water System as a means of accomplishing this purpose (adding a percentage of fluoride to the water to prevent dental caries in children under the age of fourteen) means that the persons drinking said water will receive said "treatment" for dental caries and such "treatment" would become "compulsory" for any person who has to rely upon the St. Louis County Water Company supply as his source of drinking water.

Fifth, that plaintiffs, being consumers of water distributed by the St. Louis County Water Company, will be compelled to drink the water containing fluoride because there is no other practical source of supply other than from the St. Louis County Water Company.

Conclusions of Law.

The Court, in the absence of any legal memorandums having been presented to it construing the legal questions involved, has diligently searched the decisions in attempting to rule correctly upon the legal and constitutional questions involved, and, as the subject of fluoridation of public water supplies has been brought before the higher tribunals of many of our sister states, a review of these

cases and the facts involved in each was mandatory before the Court could come to any conclusion. Many of the cases construing the constitutionality of fluoridation have been upheld against a variety of attacks by water consumers. The majority opinions in these cases sustain the right of municipalities to adopt such, reasonable and undiscriminating measures to improve their water supplies as are believed necessary to protect and improve the public health even in cases in which no epidemic is imminent and no contagious disease or virus is directly involved. The opinions also hold that the municipality may, as stated previously, order fluoridation of its **public water supply** and justify same as a public health measure even though it would be of no benefit to older persons but only aid in preventing tooth decay in persons under fourteen years of age; the reasoning being that it is readily seen that the children and youth of today are the adult citizens of tomorrow, and, therefore, that segment of the population unquestionably benefited by the drinking of fluoridated water (those children under the age of fourteen) would in a few years comprise a very large percentage of the population and it would therefore follow that the reduction of the incidence of tooth decay in children would also benefit their parents. These opinions also appear to gloss over the argument as made by plaintiffs in the case at bar that such fluoridation would be forced medication or medical treatment forbidden by the tenets of certain churches or religious sects, and consequently an ordinance such as the one before this Court, to-wit: Ordinance No. 01480, violated the right of free exercise of religion. Again, these courts have held against an attack on the constitutionality of said ordinances that they are valid in all respects as an exercise of the police power and as they are not arbitrary or unreasonable they do not invade the rights secured the individual by fundamental law. A recent California decision held that there could

be no judicial review of the advisability of the council's determination to fluoridate its water supply when it appeared of record that the city council had passed a resolution on fluoridation and prior to doing so had held a hearing and considered the various contentions made regarding the advisability of fluoridation and that, as in the present case, the council had the jurisdiction to act and make a determination, and in the absence of showing an unreasonableness or abuse of discretion there could be no judicial review of the advisability as made by the council. Likewise the decisions of our sister states appear almost unanimously to dispense with the arguments as made by plaintiffs in the case at bar concerning the illegality of said ordinance in that the council was ordering a poison to be put in the water; a forced medication to the population; that the fluoridation would not promote the general welfare of the people, and therefore this Court will not further concern itself with these arguments made by plaintiffs and will dismiss said allegations and will no longer discuss this part of plaintiffs' contention.

In all of this Court's investigation and review of cases it has not been able to find any case which is on all fours with the facts in this case and, therefore, the decisions rendered in the many cases considered by the Court would not be exactly in point. Here, as alleged by plaintiffs, we have a County Council acting under a charter form of government which has passed an ordinance attempting to regulate the distribution of water and to fluoridate same not only in the unincorporated areas where the Council no doubt has jurisdiction, but also in those municipalities which are separate entities and wherein the Council of said St. Louis County does not have any jurisdiction under its charter. Neither has this Court been able to find a case wherein a municipality has attempted to order a **privately owned** water company to fluoridate its water supply when the statutes of the state, as here, are set up

by the legislature giving the Public Service Commission of said state the jurisdiction over all water companies and the power to prescribe rules and regulations as well as defining specifically by said rules and regulations what said water companies may or may not add to their water distribution system (Laws of Missouri, 1949, Public Service Commission, Sections 393.130, 140 as well as Sections 386.240, 250, 310).

Evidence adduced at the trial of this cause proved conclusively that some of the plaintiffs reside in incorporated municipalities which are not governed or controlled by the County Council of St. Louis County under the charter form of government in said county, but as taxpayers of not only their incorporated municipality, to-wit: Ladue, Richmond Heights and Webster Groves, but also as taxpayers and residents of the County of St. Louis, obtain their water supply from the same St. Louis County Water Company, which under contract, as adduced by the evidence, supplies water to these as well as many other incorporated municipalities in addition to the unincorporated areas of St. Louis County, which it is admitted are governed by the County Council under the charter of St. Louis County adopted pursuant to the Statutes of Missouri. The Court, therefore, holds that said ordinance 01480 is unconstitutional and void in that said ordinance attempts to order a privately owned company to fluoridate its entire water system when some of the users of said water, and specifically plaintiffs being residents and taxpayers in incorporated areas have had no opportunity to vote upon the measure of fluoridation, such an order being in direct violation of Article VI, Section 18 (c) of the Missouri Constitution which provides as follows:

> "Provisions authorized in County charters—Participation by county in government of other local units. —The charter may provide for the vesting and exer-

cise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and **it may provide, or authorize** its **governing body** to **provide**, the terms upon which the county **shall perform any of the services** and **functions** of **any municipality, or political subdivision** in the **county**, except school districts, **when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote.**"

The evidence in this case clearly showed that some of the plaintiffs living in Webster Groves, Richmond Heights and Ladue did not have an opportunity to vote upon the question of fluoridation and said reading of paragraph 7 of the aforesaid Section 18 (c) clearly requires a vote of the majority of the qualified electors thereon in municipalities or subdivisions prior to a county (charter form of government—St. Louis County) performing any of the services and functions of any municipality.

Likewise, said ordinance is in violation of Article III, Section 22 of the charter of St. Louis County, which provides the manner in which the County shall perform any of the services and functions of any municipality and requires an acceptance by a vote of a majority of the qualified electors voting thereon in said incorporated municipality. This Article III of St. Louis County's charter was enacted pursuant to and in conformity with the aforesaid Article VI, Section 18 (c) of the Missouri Constitution and the Court therefore holds that said ordinance deprives plaintiffs of "life, liberty and property without due process of law", and is in violation of the Fourteenth Amendment of the Constitution of the United States and is therefore void and unconstitutional.

By this holding the Court has discounted the arguments made by counsel in many of the cases upholding the right

to fluoridate wherein those judges have held that there is not a violation of the Fourteenth Amendment in that the ordinance does not subject plaintiffs to any penalty nor does it compel plaintiffs to do anything. However, this Court believes and so holds that the plaintiffs would be "compelled" to drink the water because there is, as stated before, no other practical source of supply, and by having paid for water they would actually be receiving "treated water" and would be "compelled" to take the treatment as it is their only source of drinking water, and of necessity by drinking the water which they have been paying for and using, they, plaintiffs, would be **compelled to consume fluoridated or treated water.** The liberty, therefore, that plaintiffs are deprived of might be said to be that decision that they should be free to make as to whether they desire to apply fluorine to their teeth for the purpose of preventing tooth decay or not.

Jurists have upheld similar ordinances on the grounds that same is a valid exercise of, as here, the County's police powers and/or under the general welfare clause of the statutes. However, the courts must also recognize that the rights of the police power are correlative with the inherent individual rights or as stated by the Fourteenth Amendment of the Constitution of the United States, the right secured to each individual, the right to life and liberty that neither the state nor the County Council under the charter form of government may infringe upon or deprive an individual of these rights. Naturally, liberty can and should be regulated by law but an exercise of police power which deprives an individual of any of these rights must conform to due process. As here in the case of fluoridation, the right, as asserted by the County Council, is in protecting and promoting the public health against dental caries, but on the other hand we must protect the right of the individual, the right to liberty. Any regulation or measure directly affecting the

person in his bodily liberty or integrity represents the most incisive exercise of the police power. This Court adopts the reasoning of Mr. Justice Harlan of the United States Supreme Court when he stated in Jacobson v. Massachusetts, 197 U. S. 11,

> "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint **under conditions essential** to the **equal enjoyment** of the **same right by others.** It is, then, liberty regulated by law. There is, of course, a sphere in which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, **under the pressure of great dangers,** be subjected to such restraint, to be enforced by **reasonable** regulations, as the safety of the **general** public may demand" (emphasis supplied).

Now, can it be said that the "fluoridation ordinance", being an infringement of the individual's constitutional right of freedom of choice in matters relating to his own bodily care and health is justified by "conditions essential to the equal enjoyment of the same right by others" or can it be justified by "pressure of great dangers" to the public health?

Evidence adduced at the trial termed "dental caries" a "disease" and as such is prevalent in the teeth of almost everyone but is not contagious or communicable in any way. It was further concluded under the evidence that dental caries in no way endangers the public health in

the sense that its existence in the teeth of one individual might adversely affect the personal health of any other individual.

In discussing public health Mr. Justice Hill, in Kaul v. City of Chehalis, 277 P. 2nd 352, l. c. 359, stated,

> "To thus extend the concept of 'public health' would open the door to compulsory mass medication or preventive treatment for any disease, solely on the ground that it is for the individual's own good; without regard to his inherent right to determine such matters for himself."

Medication to the lay individual would include prophylaxis or preventive measures when applied to the individual. Defendants under their evidence contend that fluoridation is not medication in that it does not cure anything but merely prevents dental caries. Aren't we delving into semantics? Defendants would readily admit that an ordinance requiring every resident or child under fourteen years of age to present himself or herself for topical application of fluorides by public health authorities would be unconstitutional. However, is the fluoridation ordinance, under attack by plaintiffs, any different? If the children under the age of fourteen could not be compelled to present themselves one by one to the health authorities for such topical application of fluorides, how could the County Council by the ordinance in question indirectly force the residents of this County to do "en masse" what the Council could not compel each individual to do—submit himself for individual treatment? If as Justice Hill states, the protection of dental health is an object for which the police power may be legitimately invoked and fluoridation would reasonably promote such object, nevertheless the courts should go further to determine whether such a proposed regulation attempts to achieve this object by "compulsory treatment" and

consequently would be an invasion of bodily liberty prohibited by the Fourteenth Amendment of the Constitution of the United States. If fluorine is the key to dental health and, as the evidence shows fluorides are readily available to all who desire them, it appears that through proper education and persuasion the people would accept the application of fluorides and would not have to be compelled to be subjected "en masse" to fluorides. Again the "pressure of great dangers", that Justice Harlan referred to as being present when the rights of an individual must be subjected to the safety of its members by reasonable regulation and restraint as the safety of the general public might demand, is just not present and it can't be found under the evidence submitted to this Court. The ordinance, therefore, is invalid and unconstitutional as an unwarranted and unjustified invasion of the liberty as guaranteed plaintiffs and others under Section I of the Fourteenth Amendment of the United States Constitution.

If the Court needed any further authority to justify its conclusion it can be found in the very recent case of John Carson et al. v. Joe Oxenhandler et al., 334 S. W. 2nd 394, decided by the St. Louis Court of Appeals on April 19, 1960. The Court in discussing the facts stated that said case was a sequel to that of Schmoll v. Housing Authority of St. Louis County, Missouri, 321 S. W. 2nd 494, decided by the Supreme Court of Missouri wherein the Court held, "because of the explicit provision of the charter of St. Louis County, requiring the County Council to enter into a cooperation agreement only by an ordinance, an agreement entered into with the Housing Authority of St. Louis County under a resolution of the County Council was invalid." The trial court, in Carson v. Oxenhandler (supra), held that the ordinance enacted by the St. Louis County Council following the direction of the Supreme Court in the Schmoll case, was valid as an administrative

or ministerial duty; however, the St. Louis Court of Appeals stated (page 23 of their opinion), "while there are decisions to the contrary, as the cases cited from other states have shown, we are of the opinion that the right of the people of a city or county to express their wishes on an undertaking of this nature should not be denied by a too-restrictive interpretation of the character of the ordinance under consideration," and held the ordinance under question to be one of legislation and, therefore, subject to the right of referendum, whereas if it was administrative or ministerial ordinance it would not have been subject to referendum.

The Court, therefore, declares Ordinance 01480, known as the fluoridation ordinance, to be void and of no effect for the aforesaid reasons and enjoins defendants from carrying out any of the provisions of said ordinance.

/s/ Douglas L. C. Jones,
Douglas L. C. Jones,
Judge.

APPENDIX C.

Order of the Supreme Court of Missouri in Cause No. 48,453 Overruling the Motion for Rehearing, etc., made and entered January 8, 1962.

And thereafter, and on the 8th day of January, 1962, the following further proceedings were had and entered of record in said cause; to-wit:

Dagmar Readey et al.,

Respondents,

48,453. vs.

St. Louis County Water Company, a Corporation et al.,

Appellants.

Now at this day, the Court having seen and fully considered the motion of the respondents for a rehearing in the above entitled cause or, in the alternative, for a transfer of said cause to the Court en Banc, doth order that said motion be, and the same is hereby overruled.

APPENDIX D

Ordinance No. 01480, of the Ordinances of the County Council of St. Louis County, Missouri, reads as follows:

"An Ordinance

"Authorizing and Directing the Introduction of Fluorides Into the Public Water Supply System Which Serves St. Louis County, Missouri, and Providing for the Regulation of Fluoridation.

"Whereas, it is the consensus with scientific, medical and dental opinion, that the presence of fluorides in drinking water is a deterrent to tooth decay; and

Whereas, an adequate concentration of such chemical is not found in the natural supply of water distributed to the citizens of St. Louis County; and

Whereas, the fluoridation of drinking water has been endorsed by the United States Public Health Service, Missouri Division of Health, the St. Louis County Health Department, the American Public Health Association, the St. Louis County Dental Association, the St. Louis County Medical Society, the American Water Works Association, and various local civic groups and organizations; and

Whereas, fluorides can be introduced into the drinking water supply of St. Louis County as a measure to promote the public health and welfare;

Now, Therefore:

Be It Ordained by the County Council of St. Louis County, Missouri, as Follows:

Section 1. St. Louis County Water Company is hereby authorized and directed to provide the means and to proceed with the introduction of the fluoride

ion into the public water supply of St. Louis County in such quantities as are required to maintain throughout the pipe distribution system of fluoride concentration of approximately one part fluoride per million parts of water.

Section 2. The St. Louis County Water Company shall keep an accurate record of the amount of fluorine bearing chemical applied, the quantities of water treated and cause such analytical tests to be made for fluorides (in terms of the element F) in the untreated and treated water as it shall be directed to do by the St. Louis County Health Department.

Section 3. The St. Louis County Health Commissioner is hereby directed to make periodic reports to the County Council on the fluoridation of the water supply and to seek the cooperation of education and scientific institutions, to conduct surveys and research as to the beneficial effect of the program and project on the citizens of St. Louis County.

Section 4. The County Clerk is herby directed upon the enactment of this ordinance to make available for distribution to the public, at his office, printed copies of this ordinance and to publish this ordinance in some newspaper in the County in three successive weeks, the last publication to be not later than thirty days after the enactment hereof.

Section 5. This ordinance shall become effective forty (40) days after its enactment.

Adopted May 27, 1959.

Thomas C. Dunne,
Chairman, County Council."

APPENDIX E.

Section 1 of the Fourteenth Amendment of the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX F.

Article VI, Section 18 (c) of the Constitution of Missouri:

"**Provisions authorized in County charters—Participation by county in government of other local units.—** The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county shall perform any of the services and functions of any municipality, or political subdivision in the county, except school districts, when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote."

APPENDIX G.

Home Rule Charter for St. Louis County, Mo., Art. III, Sec. 22 (subsections 19, 20 and 24):

"(19) To provide the terms upon which the County shall perform any of the services and functions of any municipality or political subdivision in the County, except school districts, when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision, which acceptance may be revoked by a like vote; and to cooperate and contract with the municipalities or political subdivisions in the County as otherwise authorized by this charter and by law;

"(20) To exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the County outside incorporated cities, and on such other subjects as may hereafter be authorized by the Constitution or by law, provided that, until superseded by ordinances of the Council, the laws pertaining to said matters shall continue to be valid and effective;

"(24) To exercise all powers of legislation now or hereafter conferred upon counties by the Constitution, law and this charter, and to determine and make provision for any matter of County government not otherwise provided herein, including any matter involved in the transition to the form of government provided by this charter."

APPENDIX H.

42 U. S. C. A., Sec. 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX I

"**Sec. 196.125, R. S. Mo. 1959. Definition of 'nonalcoholic drink'.**—That the term 'nonalcoholic drink', as used herein, shall include carbonated beverages of all flavors, sarsparilla, ginger ale, soda water of all flavors, lemonade, orangeade, root beer, grape juice, and all other nonintoxicating drinks."

"**Sec. 196.135, R. S. Mo. 1959. Nonalcoholic drink adulterated, when.**—A nonalcoholic drink shall be deemed to be adulterated within the meaning of sections 196.125 to 196.145, if it contains any added boric acid or borates, salicylic acid or salicylates, formaldehyde, sulphurous acid or sulphides, hydrofluoric acid or fluorides, fluoborates, fluosilicates, or other fluorine compounds, dulcin, glucin, betanaphthol, hydronaphthol, abrastrol, asaprol, oxides of nitrogen, nitrous acid or nitrates, compounds of copper, pyroligneous acid, or other added substance deleterious to health."

"**Sec. 196.145, R. S. Mo. 1959. Penalty.**—Any person who shall violate any of the provisions of sections 196.125 to 196.145 shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than one hundred dollars, or not more than six months in jail, or both."

APPENDIX J.

"**Sec. 192.300, R. S. Mo. 1959.—Class one counties may make additional health rules—record and publication—violation a misdemeanor.**—The county courts of the several counties of class one are hereby empowered and permitted to make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county; provided such rules, regulations and ordinances shall not be in conflict with any rules or regulations authorized and made by the division of health in accordance with this chapter. After the promulgation and adoption of such rules, regulations or ordinances by such county court, such court shall make and enter an order of record declaring such rules, regulations or ordinances to be printed and available for distribution to the public in the office of the county clerk, and require a copy of such order to be published in some newspaper in the county in three successive weeks, not later than thirty days after the entry of such order. Any person, firm, corporation or association violating any of the rules, regulations or ordinances adopted, promulgated and published by such county court shall be deemed to be guilty of a misdemeanor and prosecuted, tried and fined as otherwise provided by law. The county court of any such county is hereby given full power and authority to instigate the prosecution of any action under this section."

APPENDIX K.

"**Sec. 386.250, R. S. Mo. 1959. Jurisdiction of commission.**—The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

• • •

(7) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state; provided, that nothing contained in this section shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or system in any city of this state, except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality;

• • •

(9) To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined. And to such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly."

Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 105

DAGMAR READEY, EDWARD L. GLAUERT, HIRAM SCHMEDEL, CHRIS J. MUCKERMAN, HENRY J. JOHNSON, ROBERT BURKHAM, MIGNON E. DIETRICH, and JACK WELCH, JR.,
Plaintiffs-Appellants,

vs.

ST. LOUIS COUNTY WATER COMPANY, a Corporation,
Defendant,

and

THOMAS C. DUNNE, MAURICE M. ABRAMSON, JOHN J. DOWLING, RICHARD A. HETLAGE, RUSSELL A. GRANTHAM, GEORGE E. BOHRER, JOHN F. MOLLOY, Members of the County Council of the County of St. Louis, Missouri; EDWARD A. WALSH, County Clerk of St. Louis County, Missouri; DR. C. HOWE ELLER, Acting Health Commissioner of the County of St. Louis, Missouri, and Successors in Office,
Defendants-Appellees.

Appeal from the Supreme Court of Missouri.

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS WITH SUPPORTING BRIEF BY DEFENDANTS-APPELLEES.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

DAGMAR READEY, EDWARD L. GLAUERT, HIRAM SCHMEDEL, CHRIS J. MUCKERMAN, HENRY J. JOHNSON, ROBERT BURKHAM, MIGNON E. DIETRICH, and JACK WELCH, JR.,
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Defendant,

and

THOMAS C. DUNNE, MAURICE M. ABRAMSON, JOHN J. DOWLING, RICHARD A. HETLAGE, RUSSELL A. GRANTHAM, GEORGE E. BOHRER, JOHN F. MOLLOY, Members of the County Council of the County of St. Louis, Missouri; EDWARD A. WALSH, County Clerk of St. Louis County, Missouri; DR. C. HOWE ELLER, Acting Health Commissioner of the County of St. Louis, Missouri, and Successors in Office,
Defendants-Appellees.

Appeal from the Supreme Court of Missouri.

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS APPEAL FROM STATE COURT.

Thomas C. Dunne, Maurice M. Abramson, John J. Dowling, Richard A. Hetlage, Russell A. Grantham, George E. Bohrer and John J. Molloy, as members of the County Council of St. Louis County, Missouri; Edward A. Walsh, County Clerk of St. Louis County, Missouri; Dr. C. Howe Eller, Acting Health Commissioner, St. Louis County, and successors in office, Appellees in the above-entitled cause, pursuant to Rule 16 of the Revised Rules of the Supreme

Court of the United States, move this Court that the final judgment and decree of the Supreme Court of Missouri be affirmed and, in the alternative, that the appeal herein be dismissed upon the following grounds:

1. There is no substantial federal question involved.

2. The decree and judgment of the Supreme Court of Missouri did not draw into question the validity of any state statute on the grounds of its being repugnant to the Constitution of the United States.

3. The real question involved is one of fact and not of law and is not reviewable in this Court.

4. The federal questions sought to be reviewed were not timely or properly raised.

5. The federal questions involved were not passed on by the Supreme Court of Missouri.

6. The judgment of the Supreme Court of Missouri rests on adequate non-federal basis.

BRIEF.

STATEMENT.

This is a direct appeal from the final judgment and decree entered on December 11, 1961, by the Supreme Court of Missouri dismissing Appellant's suit at their cost and reversing a judgment of the Circuit Court of St. Louis County, Missouri, which granted an injunction at the instance of the Plaintiff-Appellants restraining the Defendant-Appellees from carrying out any of the provisions of St. Louis County, Ordinance No. 01480, and further declaring said Ordinance to be void. Ordinance 01480 authorized and directed the St. Louis County Water Company to proceed with the fluoridation of the public water supply of St. Louis County. Ordinance 01480 is found in Appendix D in Appellant's jurisdictional statement and the decision of the Supreme Court of Missouri is found in Appendix A therein and also in 352 S. W. 2d 622.

St. Louis County Water Company is a privately owned company operating under the regulations and supervision of the Public Service Commission of the State of Missouri. The company owns and operates water work plants and other facilities for the distribution and sale of water for individual consumption as well as for sale to incorporated municipalities within St. Louis County and ultimately through those cities for sale to indivjdual consumers. The Appellants are taxpayers of St. Louis County and consumers of water distributed by the company.

The County Council of St. Louis County, Missouri, on May 27, 1959, adopted Ordinance No. 01480, which authorized and directed the St. Louis County Water Company to provide the means to introduce a sufficient quantity of the fluoride ion into the water it furnished County consumers

to maintain throughout the distribution system a fluoride concentration of approximately one part fluoride per million gallons of water. The Ordinance recites that the action was taken after a finding that it was the concensus of scientific, medical and dental opinion that the presence of fluorides in drinking water is a deterrent to tooth decay; also finding that there was an inadequate concentration of such chemical in the natural supply of water to the citizens of St. Louis County; and further finding that fluorides could be introduced into the drinking water supply of St. Louis County as a measure to promote the public health and welfare.

The Appellants attacked the validity of the Ordinance of the County on the ground that it was beyond the power of the County Council; that the Ordinance violates the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10, of the Missouri Constitution, V. A. M. S., in that it unduly infringes their and other County residents freedom of choice in matters relating to bodily care and health by compelling them to drink fluoridated water against their wills; and that the enforcement of the Ordinance would violate Missouri Statutes relating to the adulteration and misbranding of non-alcoholic drinks. The Circuit Judge held that the County Council had no such authority to take the action; accordingly, entered judgment in favor of the Plaintiff. The Supreme Court of Missouri reversed the decision of the lower court holding that the County Council had express authority to pass the Ordinance and that the exercise of such authority would violate no constitutional rights of the Plaintiffs-Appellants, and that it was not in violation of any of the Statutes of the State of Missouri. Plaintiffs have accordingly appealed to this Court.

ARGUMENT.

The decision of the Supreme Court of Missouri is correct and is supported by the decisions of this Court so that the questions raised on appeal are unsubstantial and warrant no further argument in this Court.

The findings of facts and conclusions set forth in the opinion of the Supreme Court of Missouri clearly show that the Appellee was acting within the police power expressly conferred upon them by the Constitution and laws of the State of Missouri and by the Home Rule Charter for St. Louis County, and that the action taken by the County was for the purpose of protecting the health of the citizens and promoting the public welfare in a manner and to an extent reasonably necessary for the public interests. The record shows and the Supreme Court opinion shows that dental caries among children and tooth decay among adults is one of the most prevalent diseases effecting the human body and that the injection of fluoride into the public water supply to the extent proposed by the County will, in a large measure, alleviate this disease which is widespread in St. Louis County, without any harmful effects upon anyone who drinks such water; that fluoride or minerals which exist naturally in the water supply of many communities throughout the United States and in many foods consumed by human beings; and in particular that fluorides already exist in the public water supply of St. Louis County at approximately 0.5 parts per million gallons of water. At the present time, flourides are being added to the public water supply in practically every state of the union and in the District of Columbia and in many communities in the State of Missouri. The record further shows and the opinion of the Supreme Court further shows that there is a great deal of evidence,

to maintain throughout the distribution system a fluoride concentration of approximately one part fluoride per million gallons of water. The Ordinance recites that the action was taken after a finding that it was the concensus of scientific, medical and dental opinion that the presence of fluorides in drinking water is a deterrent to tooth decay; also finding that there was an inadequate concentration of such chemical in the natural supply of water to the citizens of St. Louis County; and further finding that fluorides could be introduced into the drinking water supply of St. Louis County as a measure to promote the public health and welfare.

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including the opinions of well-qualified experts, that the fluoridation of water as proposed in the Ordinance of the Appellees would result in harm to no one and would have no undesirable effects on birth rate, death rate, elderly or sick individuals or any other persons. As a result of these facts and of various studies and experiments on this subject, the fluoridation of public water supplies has been approved and recommended by the St. Louis Dental Association, the Missouri State Dental Association, the American Dental Association, the American College of Dentists, the Missouri Public Health Association, the American Public Health Association, the Missouri State Department of Health, the U. S. Department of Health, Education and Welfare, the St. Louis Medical Society, the Missouri State Medical Association, the American Medical Association, the St. Louis County Health Department, and the Department of Health for the State of Missouri, as well as numerous other national and state scientific organizations.

Appellants on pages 4 and 5 of their jurisdictional statement cite various decisions of this Court which they contend will support the jurisdiction in this case and on pages 6 through 10, state several questions which they contend raise such Federal questions as will support the jurisdiction of this case in this Court. The Appellees will discuss these questions in this Brief separately in order to establish an orderly procedure herein.

I.

No Federal Question Is Presented as to the Issue as to Whether or Not the County Council of St. Louis County, as the Legislative Body of the County, May Pass an Ordinance Fluoridating the Communal Water Supply Without a Vote of the People of St. Louis County.

The question determined by the Supreme Court of Missouri in regard to the authority of the County Council to pass an Ordinance relating to the public health of persons residing within the entire County including incorporated municipalities, hinged on the determination of that Court as to whether the provision found in the State Constitution, Article VI, Section 18 (c) was the sole authority for the County to exercise such action or whether St. Louis County, as a Home Rule Charter first class county, might exercise the powers in regard to public health pertaining to first class counties generally in the State of Missouri. No issue has heretofore been raised by the Appellants in any of the lower courts as to their denial of the right to vote on the fluoridation measure involving the prohibition found in the Fourteenth Amendment to the Constitution of the United States. In any event, the determination as to whether or not a right to vote in the fluoridation measure, is one of local concern to be determined by the Missouri Courts and not one presenting a Federal question.

It would appear in order to clarify the political status of St. Louis County in view of the contentions of the Appellants. St. Louis County was a classic county of the first class, a political subdivision of the State of Missouri, as provided for under the Constitution and laws of Missouri prior to January 1, 1951. On March 28, 1950, the people of St. Louis County adopted a Home Rule Charter pursuant to the authority granted in the Constitution of Missouri,

Article VI, Section 18 (Set out in full in Appendix A. page 21). Section 18 (a) provides that any county in the state having more than 85,000 inhabitants may frame, adopt and amend a Charter for its own government as provided in said Section 18. Section 18 (b) specifically provides that the Charter must provide for the form of the County government, the number and kind, the matter of selection, the terms of office and salaries of the County officers, and for the "EXERCISE OF ALL POWERS AND DUTIES OF COUNTIES AND COUNTY OFFICERS PRESCRIBED BY THE CONSTITUTION AND THE LAWS OF THE STATE." Section 18 (c) to which the Appellants make reference in their statement of jurisdiction authorized charter counties to provide in their charter for the exercise of certain legislative powers in the part of the County outside of incorporated cities, and further provided that the County might perform services and functions of municipalities and political subdivisions in the County when accepted by a vote of the majority of the qualified electors.

Since the adoption of its Home Rule Charter, the Missouri Courts have consistently held, and settled beyond all peradventure, that St. Louis County, as a constitutionally chartered county may and, in some instances, must exercise all the power and authority of counties of the first class in the state. In **State ex rel. Arthur B. Shepley, Jr. v. Clark R. Gamble,** 365 Mo. 215, 280 S. W. 2d 656 (Supreme Court of Missouri, en banc 1955), the Missouri Court stated l. c. 659:

> "St. Louis County, regardless of its charter, remains a legal subdivision of the state. Article VI, Sections 1 and 18 (a). As such, it is charged with the performance of the state functions just as other counties are. Section 18 (b) . . . expressly requires that the Charter must provide 'for the exercise of all

powers and duties of counties and county officers prescribed by the Constitution and laws of the State."

Thus, as an arm of the state and a political subdivision of the State of Missouri, St. Louis County continued, even after the adoption of its Charter, to perform all those functions which the State might delegate to it through the legislature, but, in addition, by reason of its charter status, was able to perform certain functions and render services in the area of the County outside incorporated municipalities and select the particular officers and departments of the County government which might perform the functions of the State.

In essence, St. Louis County by virtue of its peculiar status, as a Home Rule Charter County, is no longer limited to exercising powers as a first class county, but in addition, it may exercise all powers granted by the Constitution and its Home Rule Charter. Specifically, the Home Rule Charter provided in Article I, Section 2, that the new government of St. Louis County should have all the powers vested by the Constitution and laws of Missouri in county courts, county offices, counties of the first class, etc. Therefore, the Supreme Court of Missouri, when in its opinion in this case, stated that the County Council was and is authorized to enact ordinances tending to enhance the health of the residents of St. Louis County, irrespective of whether they also reside within a municipality, was merely following the law as it had previously established it, and decided the constitutional provision in 18 (c) was not the only method by which a Charter County might exercise legislative power pertaining to public health.

The Supreme Court then found that as a first class county, the county through its legislative body, might exercise such powers, including those relating to public

health, as are granted to first class counties by the state regardless of municipal boundary lines. Following this reasoning, the Supreme Court of Missouri in interpreting its own Constitution found that the limitation contained in Article VI, Section 18 (c) did not apply to the Ordinance in question. However, the Missouri Court found that the power of the Appellees or the legislative body of St. Louis County (which body is elected from districts which include both the incorporated and unincorporated areas of the entire St. Louis County), is not limited to said Section 18 (c), but that the Appellees may also exercise the powers relating to public health imposed upon "any county of the first class." In particular, the Supreme Court found that the Appellees may exercise by Ordinance the police power pertaining to the enhancement of public health in the County granted to "any county of the first class" by Section 192.300, R. S. Mo., 1959 (Appendix J—Appellants' statement as to Jurisdiction) as appropriated by the legislature of Missouri from Article IV, Section 37 of the Constitution of Missouri (Appendix B, page 24).

Clearly, the Plaintiffs-Appellants had, under the State Constitution and laws of the State of Missouri, no right to vote on the fluoridation measure in question here under said Section 18 (c). Then, there seems to be no question presented similar to that found in **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. (2d) 663, where, as we understand the issue involved in that case, there was no question as to the right of the Plaintiffs to vote under the Constitution and laws of the State of Tennessee, but rather a question as to whether, an unquestioned right to vote had been debased by the apportionment statute in effect in that State. The question involved in the instant case is little different than that found in **Attorney General of the State of Michigan v. Lowrey**, 199 U. S. 233, 26 S. Ct. 27, 50 L. Ed. 167, in which the appellants in that case

attacked the validity of a state act creating a new school district upon the grounds among others that "it deprives the school district or municipality of the right of local self-government, guaranteed all municipalities by the Constitution." This Court correctly stated that such question was of no concern since it presented a strictly local question. The same doctrine was recognized in **Kingsley's International Picture Corporation v. Regents of the University of the State of New York**, 360 U. S. 684, 79 S. Ct. 1362, 3 L. Ed. (2d) 1512, when this Court stated: "We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it." In the same case, this Court cited **Albertson v. Millard**, 345 U. S. 242, 73 S. Ct. 600, 97 L. Ed. 983, where the Court again reiterated that the interpretation of the intent of the state legislation is primarily a function of the state authorities, judicial and administrative and that the construction, as given, is binding upon Federal Courts.

In view of the foregoing, it would appear clear and explicit that no issue involving a Federal question appears in this case growing out of the construction of Section 18 (e), Article VI of the Constitution of the State of Missouri or growing out of the contended conflict between Article VI, Section 18 (e) and Section 192.300, V. A. M. S., and therefore there is no permissible ground under which this Court can acquire jurisdiction of the subject matter.

II.

No Substantial Federal Question Is Raised to Support Jurisdiction in This Case by the Contention of the Appellants That the Fluoridation Ordinance Constituted Infringement of Liberties Guaranteed to Them Under Section One of the Fourteenth Amendment to the Constitution of the United States Because Ordinance No. 01480 Is a Valid Exercise of the Police Power of the State of Missouri in the Promotion of the General Health of the Public, Which Power the State Did Not Surrender in Becoming a Member of the Union Under the Constitution of the United States.

Appellants on page 4 of their jurisdictional statement cite three decisions of this Court which they contend will support the jurisdiction in this case as to the question of accepting compulsory fluoridation of drinking water in a public water system. The only one of these cases which is directly applicable is that of **Jacobson v. Massachusetts**, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643. In this case, Jacobson was convicted for refusing to submit to compulsory small pox vaccination as required by the laws of Massachusetts. An appeal was taken to this Court on the grounds that the statutes of the State of Massachusetts deprived him of liberty without due process of law and denied him equal protection of the laws in violation of the Fourteenth Amendment. This Court sustained the conviction and held (1) that the state was acting under its police power—a power which it did not surrender in becoming a member of the union under the Constitution; (2) that the State statute was enacted to protect the public health and the public safety of the people of Massachusetts and (3) that the Appellant's right to liberty was subject to such action by the State in order to secure the general comfort, health and prosperity of its citizens.

This Court further held that the safety and health of the people of the State are in the first instance for that commonwealth to guard and protect and are matters that do not necessarily concern the national government.

It may be noted that in the Jacobson case there was a direct compulsion upon all citizens of the state to submit their bodies to medical vaccination for the purpose of preventing a widespread disease. In the instant case, the Supreme Court of Missouri has pointed out that there is no direct compulsion on the Appellants or anyone else to drink the water which is offered by the St. Louis County Water Company for sale. Plaintiffs, if they desire, may use the public water supply for washing, cooking, bathing, sprinkling, and other general purposes. They can easily secure drinking water from other sources. There is no substantial evidence in the record that shows Appellants would be greatly inconvenienced by securing their drinking water elsewhere or by other means. Further, it is to be observed, as the Supreme Court of Missouri pointed out, this Court in the Jacobson case said: "If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution. * * *" That rule has not been violated in the instant case.

Accordingly, if a police power measure is properly referable to the public health, the Fourteenth Amendment does not deprive a State or its political subdivisions of the

right to preserve order or to protect the health of the people under its police power, and in the exercise of its power, the legislative branch may interfere with and impair the individual liberties of the citizens in a manner and to an extent reasonably necessary to the public interests and the court will not interfere unless the health measure invades fundamental rights or is arbitrary, oppressive or unreasonable. **Chapman v. Shreveport**, 225 La. 859, 74 So. 2d 142, Appl. Dismd. 348 U. S. 892, 75 S. Ct. 216, 99 L. Ed. 701. Such a situation does not exist here.

However, Appellants further contend that their individual rights as citizens of St. Louis County have been violated under the First section of the Fourteenth Amendment to the Constitution of the United States on their theory that the fluoridation measure would be harmful to at least a portion of the population. But, to contravene this allegation, it is only necessary to state that the determination of whether fluoridation would be helpful and in the interest of the people of St. Louis County or harmful to all or to some, remains with the legislative body enacting the ordinance, the St. Louis County Council. Unless the determination of the Council in this regard is capricious and unreasonable the Courts must be bound by that determination. In the instant situation, the Missouri Supreme Court stated in its opinion, l. c. 631: "We again recognize that we are bound by the Council's reasonable determination that the measure will result in benefit to each individual consumer and not in harm. We have held herein that the ordinance does bear a reasonable relation to public health and based upon the Council's conclusion, does tend to enhance the health of the residents of the County." Thus, the factual determination has been made by the Supreme Court of Missouri that the ordinance in question is properly referable to the police power to pro-

mote public health and consequently, no question of law remains in this regard but only one of fact. Is it for this Court to reverse that factual determination as a basis for jurisdiction?

Appellants in this Appeal, as they did in the Supreme Court of Missouri, are attempting to invoke the issue of violation of religious freedoms under the First Amendment to the Constitution as appropriated into the Fourteenth Amendment, although there is nothing in the record to indicate the religious beliefs of any of the parties or the manner in which these beliefs would be violated under the ordinance in question. In any event, this Court has expressly held that the constitutional guarantee of religious freedom has two distinct components. Freedom of religious belief is one that is guaranteed. It is not disturbed here.

The other, the freedom to practice what is dictated by one's religious belief is not unreservedly guaranteed. It is in this latter area that state police power may intervene. A legitimate and reasonable exercise of police power is valid and constitutional even though it interferes with the freedom of a religious group to practice in accord with its religious belief. **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; **Hamilton v. Regents of the University of California**, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343; and **West Virginia State Board of Education v. Barnette**, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628. This court has heretofore had occasion to consider the exact question presented here. In the case of **C. Leon D. Aryan v. John D. Butler, Mayor of the City of San Diego, et al.**, 119 Cal. App. 2d 674, 260 P. 2d 98, cer. den. 347 U. S. 1012, 74 S. Ct. 863, 98 L. Ed. 1135, plaintiff sought to enjoin the City of San Diego from adding sodium fluoride to its public water supply for the purpose of preventing

dental caries in children on the ground that such action was violative of the plaintiff's religious beliefs against the taking of medicine and deprived the plaintiff of his liberty under the Fourteenth Amendment. The State Courts of California denied plaintiff's claim. Thereupon he sought relief by certiorari from this Court, which this Court denied. In at least four other cases, this Court has also had occasion to consider the exact questions presented in this appeal. The latest in which this Court dismissed an appeal was **Birnel v. Town of Fircrest**, 53 Wash. 2d 830, 335 P. 2d 819, 361 U. S. 10, 80 S. Ct. 71, 4 L. Ed. 2d 51 (Washington). As to other appeals dismissed by this Court, see **Chapman v. Shreveport**, 225 La. 859, 74 So. (2d) 142, 348 U. S. 892, 75 S. Ct. 216, 99 L. Ed. 701; and **Kraus v. City of Cleveland**, 163 Ohio St. 559, 127 N. E. 2d 609, 351 U. S. 935, 76 S. Ct. 833, 100 L. Ed. 1463. Certiorari was denied also by this Court in a fluoridation case in **Dowell v. Tulsa**, 273 P. 2d 859, 348 U. S. 912, 75 S. Ct. 292, 99 L. Ed. 715.

Other State Courts, in addition to those cited, have sustained the rights of municipalities to fluoridate their public water supply and have held that such action violates no rights guaranteed to water consumers by the Fourteenth Amendment to the Constitution. Wisconsin—**Froncek v. Milwaukee** (1955), 269 Wisc. 276, 69 N. W. 2d 242; Oregon —**Baer v. Bend**, 206 Oregon 221, 292 P. 2d 134; Washington—**Kaul v. Chehalis** (1954), 45 Wash. 2d 616, 277 P. 2d 352; and Iowa—**Wilson v. City of Council Bluffs, Iowa**, 110 N. W. 2d 569.

III.

No Substantial Federal Question Is Before the Court to Support Jurisdiction as to the Criteria or Standards for the Amount of Fluoride to Be Used in the Drinking Water.

Appellants in their jurisdictional statement, in an effort to support jurisdiction in this Court, state that the ordinance in question in providing that approximately one part fluoride to one million gallons of water is to be added to the water supply, fails to establish a definite criteria or standard for the amount of fluoride to be used in the water in violation of decisions of this Court. The decisions referred to by Appellants, six in number, appear on page 5 of their Statement as to Jurisdiction. In all of the six cases cited by Appellants, complete discretion was placed on an administrative official to determine first whether the law had been violated and further, what constituted a violation. Unlike the ordinance in question here, five of them involved ordinances penal in character. None of these cases are directly applicable to the point raised by the Appellants. In McQuillin's Work on Municipal Corporations, 3rd Ed., Vol. 5, § 15.24, pages 110, 111, is set forth the general rule:

> "An ordinance must be clear, precise, definite and certain in its terms, and an ordinance vague to the extent that its precise meaning cannot be ascertained is invalid although otherwise it is constitutionally valid. The basis for the rule as in the case of the requirement for definiteness and certainty in statutes is a necessity for notice to those affected by the operation and effect of the ordinance and the necessity for such notice is especially strong, of course, where the ordinance is penal in character. Thus an ordinance must be framed in terms sufficiently clear and definite to

> show what it intends to require or prohibit and punish, and its language must be readily understandable by those upon whom it is to operate * * * However, it is well settled that courts will not by construction defeat the purpose and objects intended by an ordinance, if it is sufficiently definite to be understood with reasonable certainty."

The Missouri Courts, in **Fitzgerald v. Thompson**, 238 Mo. App. 519, 184 S. W. 2d 198, 304, adopted the definition for the word "approximately" as found in Webster's International Dictionary, which, as the Court states in that case, defines the word "approximate" to be: "(2) near to exactness; nearly exact; not perfectly accurate." Considering the foregoing rule and considering the record as a whole in regard to the desirable amounts of the fluoride ions to be added to drinking water, it becomes clear that there is no question but that the use of the words "approximately one part per million" fully establishes an understandable criteria and standards for water fluoridation. As the record reflects, there was substantial evidence that there would be no harmful effect from drinking water fluoridated up to two parts per million (Rec. 501) or no toxic effects up to 20 to 50 parts fluorides per million gallons of water (Rec. 505); and that the optimum portion of fluoride to water is considered to be "approximately" one part per million gallons of water. Thus the use of the term "approximately" can be clearly understood by those persons required to execute the ordinance. Further, a reading of the entire fluoridation ordinance quickly demonstrates that as a matter of fact, the fluoridation measure establishes an exact procedure and guide to be followed by both the water company and the St. Louis County Health Department. Section 2 of the ordinance provides for the keeping of accurate records of the amount of fluorine-bearing chemicals to be applied, the quantities of water

treated, and to cause the making of necessary tests as directed by the Health Department. Section 3 provides the duties of the Health Commissioner in this regard, requiring him to make periodic reports to the County Council.

Further criteria or standards that might be needed are not explained by the Respondents and raise no question that need be reviewed by this Court.

IV.

No Federal Question Vesting Jurisdiction in This Court Is Raised Under the Issue That Under Section 386.250, R. S. Mo. 1959, the Public Service Commission Has Exclusive Jurisdiction Over Private Water Companies and Therefore the County Council of St. Louis County Has No Legal Authority to Enact the Legislation in Question, or That the Ordinance in Question Is in Violation of the State Statute, Making It a Criminal Offense to Put Any Fluoride in Any Non-Alcoholic Drink, Section 196.125-196.145, R. S. Mo. 1959.

The foregoing questions raised by the Appellants and suggested to be such as to support jurisdiction in this Court bear no consideration. These questions merely concern the interpretation of the Statutes of Missouri and the fact that the Missouri Supreme Court has found these issues contrary to the view of the Appellants raises no question of due process of law or equal protection within Section One of the Fourteenth Amendment of the United States.

CONCLUSION.

Appellees, therefore, respectfully submit that the Appellants present no substantial question for the decision of this Court and that the judgment and decree of the Su-

preme Court of Missouri should be affirmed. In the alternative, Appellees submit that this Appeal should be dismissed.

Respectfully submitted,

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APPENDIX A.

Article VI, Constitution of Missouri 1945.

Special Charters.

Sec. 18 (a). County government by special charter—Limitation.—Any county having more than 85,000 inhabitants, according to the census of the United States, may frame and adopt and amend a charter for its own government as provided in this article, and upon such adoption shall be a body corporate and politic.

Sec. 18 (b). Provisions required in county charters.—The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state.

Sec. 18 (c). Provisions authorized in county charters—participation by county in government of other local units.—The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county shall perform any of the services and functions of any municipality; or political subdivision in the county, except school districts, when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote.

Sec. 18 (d). Taxation under county charters.—The county shall only impose such taxes as it is authorized to impose by the Constitution or by law.

Sec. 18 (e). Laws affecting charter counties—limitations.—Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this Constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees.

Sec. 18 (f). Petitions for charter commissions—signatures required—procedure.—Whenever a petition for a commission, signed by qualified electors of the county numbering twenty per cent of the total vote for governor in the county at the last preceding general election, is filed with the county court or other governing body, the officer or body canvassing election returns shall forthwith finally determine the sufficiency thereof and certify the result to the governing body, which shall give immediate written notice of the petition to the circuit and probate judges of the county.

Sec. 18 (g). Charter commission—appointment, number and qualification of members.—Within sixty days thereafter said judges shall appoint a commission to frame the charter, consisting of fourteen freeholders, who shall serve without pay and be equally divided between the two political parties casting the greater number of votes for governor at the last preceding general election.

Sec. 18 (h). Adoption of charter—special election—manner of submission.—The charter framed by the commission shall take effect on the day fixed therein and shall supersede any existing charter or government, if approved by vote of a majority of the qualified electors of the county voting thereon at a special election held on a day fixed by the commission and not less than thirty days after the completion of the charter nor more than one year from the

day of the selection of the commission. The commission may submit for separate vote any parts of the charter, or any alternative sections or articles, and the alternative sections or articles receiving the larger affirmative vote shall prevail if a charter is adopted.

Sec. 18 (i). Notice of special charter election.—The body canvassing election returns shall publish notice of the election at least once a week for at least three weeks in at least two newspapers of general circulation in the county, the last publication to be not more than three nor less than two weeks next preceding the election.

Sec. 18 (j). Certificates of adoption of charter—recordation and deposit—judicial notice.—Duplicate certificates shall be made, setting forth the charter adopted and its ratification, signed by the officer or members of the body canvassing election returns; one of such certified copies shall be deposited in the office of the secretary of state and the other, after being recorded in the records of the county, shall be deposited among the archives of the county and all courts shall take judicial notice thereof. This section shall also apply to any amendment to the charter.

Sec. 18 (k). Amendments of county charters.—All amendments to such charter approved by the voters shall become a part of the charter at the time and under the conditions fixed in the amendment.

Sec. 18 (l). Limitation on resubmission after defeat of charter.—No charter shall be submitted to the electors within the two years next following the election at which a charter was defeated.

APPENDIX B.

Article IV, Sec. 37, Constitution of Missouri 1945.

Public Health and Welfare.

Sec. 37. Department of Public Health and Welfare—duties and powers of General Assembly.—The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 105

DAGMAR READEY, HIRAM SCHMEDEL, CHRIS J. MUCKERMAN, HENRY J. JOHNSON, ROBERT BURKHAM, MIGNON E. DIETRICH and JACK WELCH, JR.,
Appellants,
vs.
ST. LOUIS COUNTY WATER COMPANY, a Corporation, and THOMAS C. DUNNE, MAURICE M. ABRAMSON, JOHN J. DOWLING, RICHARD A. HETLAGE, RUSSELL A. GRANTHAM, GEORGE E. BOHRER, JOHN F. MOLLOY, Members of the County Council of the County of St. Louis, Missouri; EDWARD A. WALSH, County Clerk of St. Louis County, Missouri and DR. C. HOWE ELLER, Acting Health Commissioner of the County of St. Louis, Missouri; and SUCCESSORS IN OFFICE,
Appellees.

Appeal from the Supreme Court of Missouri.

BRIEF OF THE APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS APPEAL OF APPELLANTS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

DAGMAR READEY, HIRAM SCHMEDEL, CHRIS J. MUCKERMAN, HENRY J. JOHNSON, ROBERT BURKHAM, MIGNON E. DIETRICH and JACK WELCH, JR.,
Appellants,

vs.

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Appellees.

Appeal from the Supreme Court of Missouri.

BRIEF OF THE APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS APPEAL OF APPELLANTS.

APPELLEES' ARGUMENT UNTENABLE.

The appellees have not seen fit to answer most of the arguments of the appellants, but instead undertake to justify the opinion of the Missouri Supreme Court on the

theory that Article VI, Section 18 (c) of the Missouri Constitution may be overridden by a statute which was enacted by the Missouri legislature, namely Section 192.300, R. S. Mo., 1959, which shows on its face that it was enacted expressly for the purpose, as shown by the phraseology of the statute itself, of dealing with infectious, dangerous, and communicable diseases, and those would come under the rule of law laid down in the case of **Jacobson v. Massachusetts**, 197 U. S. 11, 25 S. C. 358, 49 L. E. 643, discussed on page 18 of appellants' Statement as to Jurisdiction:

The position of the Missouri Supreme Court, as appellants have heretofore pointed out in the Statement of Jurisdiction, is wholly untenable; in one breath the Court admitted that if Article VI, Section 18 (c) of the Missouri Constitution is the only law under which the ordinance in question was passed, then the position of the appellants would be correct, and the ordinance would be void.

Then the Missouri Supreme Court goes on to contend that Section 192.300 of the Missouri statutes is applicable, and therefore it argues that Article VI, Section 18 (c) of the Missouri Constitution is not violated, a position which is wholly inconsistent and at variance with the law and the facts.

Counsel for appellees have overlooked the fact that all authority given to the county to act under its charter was at all times subject to the constitutional provisions of the State of Missouri, including Article VI, Section 18 (c). Therefore, whatever powers the county acquired would be subject to the constitutional provisions of Article VI, Section 18 (c).

Furthermore, Article III, Section 22 (subsections 19, 20 and 24) of the Home Rule Charter for St. Louis County expressly limits the authority of the County Council, and

follows Article VI, Section 18 (c) of the Missouri Constitution, in describing the functions of said County Council, to-wit:—"**To provide the terms upon which the County shall perform any of the services** and functions of any municipality or political subdivision in the County, * * * **when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision** * * *; to exercise legislative power pertaining to public health, police and traffic * * * **in the part of the County outside incorporated cities** * * *" (emphasis ours).

It will be noted that the phraseology in Article III, Section 22 quoted above is exactly the same as the phraseology of Article VI, Section 18 (c) of the Missouri Constitution:—"**when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision.**" Thus the power of the County Council is limited not only by Article VI, Section 18 (c), but by the County's very own charter which follows Article VI. Obviously therefore, the Missouri Supreme Court has ignored not only the said Home Rule Charter of St. Louis County, but also Article VI, Section 18 (c) of the Missouri Constitution.

The appellees on page 7 of their Motion to Affirm and Alternative Motion to Dismiss, state that "no issue has heretofore been raised by the appellants in any of the lower courts as to their denial of the right to vote on the fluoridation measure involving the prohibition found in the Fourteenth Amendment to the Constitution of the United States."

Appellants are at a loss to understand how the appellees can make such a statement in the face of the record which shows that the appellants immediately raised the issue in their petition in the trial Court, and then kept it alive up to this time. As appellants have set out in their State-

ment as to Jurisdiction they continued to raise the point throughout the trial, in the Supreme Court of Missouri, and in this Court.

THE RIGHT TO VOTE A SUBSTANTIAL FEDERAL QUESTION.

Nor are the appellees correct in their statement (on page 7 of their Motion to Affirm, etc.) that "the determination as to whether or not a right to vote in the fluoridation measure, is one of local concern to be determined by the Missouri Courts and not one presenting a Federal question."

Toombs v. Fortson, U. S. D. C. Ga., May 25, 1962, United States Court of Appeals, Fifth Circuit (Unit System by which political party primaries were required to be held for the election of certain state officers). (See Sanders v. Gray, 203 F. Supp. 158.)

On the contrary, the Missouri Constitution having given the appellants the right to vote, that right cannot be denied by statute, so long as that right remains in the Missouri constitution. Therefore the federal question immediately arises, and is a most important question for this Court's consideration in the case at bar, since appellants have been deprived of their constitutional rights under Section I of the 14th Amendment, as pointed out in appellants' Statement as to Jurisdiction, page 23.

Not only does this ordinance violate the federal constitution, but also it violates Article I, Section 10 of the Missouri constitution, which is set out on page 3 of appellants' Statement as to Jurisdiction.

Where a statute or ordinance violates the federal constitution, as the ordinance in question does, a substantial federal question arises.

FLUORIDATED WATER FOR COOKING, WASHING, ETC.

It is interesting to note, on page 13 of appellees' Motion to Affirm and Alternative Motion to Dismiss, the following statement:

> "Plaintiffs, if they desire, may use the public water supply for **washing, cooking, bathing, sprinkling,** and other **general** purposes. They can easily secure **drinking water** from other sources." (Emphasis ours.)

What could be more absurd than to tell the people living in St. Louis County in the incorporated areas who have the right to vote and are deprived of the same by the action of the County Council, that after paying for fluoridated water, they may now go out and purchase water for drinking purposes, while they are told to use the fluoridated water for other purposes? This in itself is a deprivation of property without due process in violation of the 14th Amendment of the U. S. Constitution and of the equal protection guaranteed by the said amendment.

The inconsistency of the appellees is further apparent when although recommending that appellants may purchase their drinking water, they would also have the citizens of St. Louis County to use the fluoridated water for **cooking**, when the record shows that when fluoridated water is boiled as in **cooking**, that the percentage of fluoride is increased because it does not pass off in vapor as some other chemicals do, such as chlorine.

The opinion of the trial judge, the Honorable Douglas L. C. Jones, shows that for all practical purposes they would be forced to drink fluoridated water.

MISSOURI SUPREME COURT PASSED UPON THE 14TH AMENDMENT.

The Mo. Sup. Ct. ruled on the 14th Amendment (p. 44 of Jurisdictional Statement). The opinion holds (p. 45), that under the ruling of the Jacobson case, 197 U. S. 31, the freedom of choice here asserted may be validly restricted and is not limited or infringed here, or infringed where the restraint imposed is necessary in order to insure equal enjoyment of the same freedom by others or arises only under the "pressure of great dangers" or where necessary to protect the individual as well as the members of the general public from the danger of a communicable or contagious disease.

As we read the Jacobson case it holds just the opposite of the position taken by the Missouri Supreme Court.

PRIOR RULING OF MISSOURI SUPREME COURT ON ART. VI, MISSOURI CONSTITUTION.

In the case of **State ex rel. Shepley v. Clark R. Gamble,** 280 S. W. (2d) 656, Supreme Court of Missouri, en banc (1956), the Court said (l. c. 660):

> "A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power."

Thus, the constitutional provision takes precedence over a legislative enactment, a fact which the Supreme Court of Missouri failed to recognize in the case at bar.

The Court further states (l. c. 660):

> "The constitution is harmonious in recognizing an exception to the provision for general laws for the organization and classification of counties. Art. VI, Sec. 8."

Counsel for appellees, on page 8 of their Motion to Affirm and Alternative Motion to Dismiss, etc., quoted from **Shepley v. Gamble**, supra (l. c. 659), but they inadvertently failed to include the sentences which we have quoted above, which bear out appellants' argument that in the incorporated areas the County Council can only act through a vote of the qualified electors because of the constitutional grants and limitations.

In the case of **Pierce v. Society of Sisters**, 268 U. S. 510, 69 L.-E. 1071, 45 S. C. 571, the State of Oregon undertook to pass a compulsory education act which required every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides. The Supreme Court of the United States held this to be an unreasonable interference with the liberty of parents and guardians to direct the upbringing and education of children under their control (l. c. 534), and in that respect a violation of the 14th Amendment. This Court held the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only (l. c. 535).

In the **Pierce** case, the opinion clearly shows that the petitioners in that case had the right of choice and were deprived of it, just as in the case at bar where the appellants are deprived of their right to choose whether or not they will accept medicated drinking water, which would be their only source of drinking water, as a practical matter.

The appellees have also overlooked the vital testimony that there is a vast difference between natural fluoridated water and artificial fluoridated water. The evidence in the case at bar showed that artificial fluoridated water is many times more potent than natural fluoridated water.

CASES RELIED ON BY APPELLEES NOT APPLICABLE.

In the case of **Kaul v. Chehalis**, 45 Washington (2d) 616, 277 P. (2d) 352, the appellant did not question the findings of fact entered by the trial court. It was a 4 to 3 decision. An examination of the majority opinion shows that it is illogical. It is based upon the theory that the prevention and extermination of dental caries is within the police power of the state. There was no question of the **right to vote** involved, and the Court came out flat-footed and stated that the police power of the city was not limited to contagious diseases as distinguished from non-contagious diseases.

A dissenting opinion points out that there are Federal constitutional questions involved, and points out that "An employed home owner in Chehalis must consume fluorides added to the water supply, or surrender constitutionally protected property rights in home and employment, and move away (unless, of course, someone wants to suggest the quibble that such a person can buy bottled spring water)." (l. c. 364) * * * "Can the State or one of its subdivisions of government circumvent constitutional controls by devising a regulation which is practically incapable of avoidance, thereby making it unnecessary to prescribe a criminal penalty? If so, the area of governmental action thus released from constitutional fetters will be limited only by the ingenuity of man. If not, I do not see how this ordinance can stand."

This dissenting judge then points out that the majority opinion had overlooked "a very important limitation upon the exercise of the police power, which is that, whether the police power is being exercised for the protection of public health or for any other reason, it may not extend to the point of impairing a constitutionally guaranteed personal right, unless justified by 'conditions essential to the equal enjoyment of the same right by others', **Crowley v. Christensen,** 137 U. S. 86, 89, 11 S. Ct. 13, 15, 34 L. Ed. 620, or by 'pressure of great dangers', **Jacobson v. Massachusetts,** 197 U. S. 11, 25 S. Ct. 358, 362, 49 L. Ed. 643."

This opinion further points out that the Supreme Court of the United States has drawn a distinction between contagious and non-contagious diseases in the **Jacobson case,** supra (l. c. 365), "where it is shown that, because of the contagious nature of a disease, a serious threat to public health is presented, the tests referred to above for determining whether the exercise of the police power can extend to the impairment of personal rights, have been met. By necessary inference, where it is shown that a disease is not contagious, these tests have not been met, and the indicated limitation upon the exercise of the police power applies. The fact that dental caries is not a contagious disease is therefore material, since it is thereby established that the limitation on the exercise of the police power applies in this case." * * * "The case before us deals with what some will regard as a relatively minor aspect of dental health. But the principle announced is not so limited. * * * What future proposals may be made to treat noncontagious diseases by adding ingredients to our water supply, or food, or air, only time will tell. When that day arrives, those who treasure their personal liberty will look in vain for a constitutional safeguard."

The learned judge further points out that no referendum vote was taken, and based upon the result of votes taken

in other places, that it is to say the least, doubtful if such a program would meet with the approval of the people of Chehalis. The judge pointed out that nine of the eleven American communities which voted on the proposition turned it down. Among these nine cities were Atlantic City, New Jersey; Salem, Oregon; Greensboro, North Carolina; and Fremont, Nebraska.

In Birnel v. Town of Firerest, 53 Washington (2d) 830, 335 P. (2d) 819, 361 U. S. 10, 80 S. Ct. 71, 4 L. E. (2d) 51 (p. 16 of appellees), the opinion was a short opinion and followed the case of **Kaul v. Chehalis**, mentioned supra. Three judges, namely, Hill, Donworth and Foster, dissented for the same reasons set out in the Kaul case.

In the case of **Wilson v. City of Council Bluffs**, 110 N. W. (2d) 569, the Supreme Court of Iowa held that municipalities have only those powers expressly given them by the legislature, those arising from fair implication, and those necessary to carry out powers expressly or impliedly granted. A stipulation was entered into. There was no issue raised as to whether or not the fluorides would prevent dental caries, or whether or not the city acted arbitrarily or abused its discretion. There was no claim that the fluoride would make the water less potable or less pure. There was no issue raised concerning the amount of fluoride the city intended to add to the water or that it exceeded the amount recommended for the accomplishment of the reduction of dental caries. There was no issue raised as to plaintiff's authority to maintain the action. No issue was raised as to whether or not the city council was duly advised upon the question of whether or not adding fluorides to the water would be beneficial to the users (l. c. 570). There were only two questions before the Court: (1) the statutory authority of the City to enact said ordinance; and (2) violation of Chapter 205 of the code of 1958, I. C. A. The trial court held the City

had no statutory authority, express or implied, to enact the ordinance, but that, assume such authority, the ordinance did not violate Chap. 205. Obviously this was a "rigged" case.

Among the cases cited by appellee on page 15, is **Hamilton v. Regents of the University of California**, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343, in which the Court says—(l. c. 258) that an appeal will not be dismissed for want of a substantial federal question unless the federal questions presented are clearly not debatable and utterly lacking in merit.

Certainly in the case at bar there is a strong federal question involved as pointed out above. The liberties guaranteed by both the Federal and State Constitutions as pointed out above are involved. It would be a work of supererogation to repeat them here. In the interest of brevity we refer to the discussions of them in the Statement as to Jurisdiction and to this reply brief.

In 54 American Jurisprudence, p. 700, § 45, the rule is thus stated:

> A Federal question is present in a controversy which draws in question the validity under the United States Constitution of an Act of Congress, a state statute, a municipal ordinance, or an order of a state administrative board or commission, as where it is claimed that such laws, ordinances or orders impair the obligation of contract, or violate the due process clause or the equal protection of the law clause of the Constitution. (Citing cases.)

LIBERTY DEFINED.

In the case of **Meyer v. Nebraska**, 262 U. S. 390, 67 L. E. 1042, 32 S. C. 625, the Court said (l. c. 399) in connection with a definition of liberty:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long **recognized at common law as essential to the orderly pursuit of happiness by free men** (citing cases). (Emphasis ours.)

CONCLUSION.

In conclusion, appellants respectfully submit that the opinion of the Supreme Court of Missouri is wholly illogical and untenable and violates the constitutional rights, both state and federal, of these appellants and those similarly situated as pointed out in the Statement as to Jurisdiction, and as herein set out.

The opinion of the trial court, on the other hand, is logical and recognizes the rights of appellants under Section I of the 14th Amendment to the Constitution of the United States, as well as the First Amendment to the Constitution of the United States. This means among other things equal opportunity to exercise political freedom and responsibility through the vote.

The questions involved are questions of the utmost importance to all of the people of the United States, since definite and important federal questions are involved, which touch a necessity of life, drinking water.

For the reasons set out in appellants' Statement as to Jurisdiction, and in this reply brief, this Court should

authorize the filing of briefs on the merits and hear early arguments.

Respectfuly submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

DAGMAR READEY, et al.,
Appellants,
vs.
ST. LOUIS COUNTY WATER COMPANY, a Corporation, et al.,
Appellees.

No. 105.

MOTION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

DAGMAR READEY, et al.,
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vs.
ST. LOUIS COUNTY WATER COMPANY, a Corporation, et al.,
Appellees.
No. 105.

MOTION FOR REHEARING.

Come now the appellants in the above entitled cause and respectfully move the Court to grant appellants a rehearing, and as grounds therefor state:

1. The Court in dismissing the appeal must have overlooked the fact, as shown by the record, that the appellants purchase their water from the St. Louis County Water Company under contracts, and the effect of the ordinance in question and of the ruling of the Missouri Supreme Court in upholding said ordinance without a vote of the people, is to impair the contracts between the residents of the incorporated areas and the water company, thereby

violating Article 1, Section Ten of the Constitution of the United States, providing that no state shall pass a law impairing the obligation of contracts, as well as violating the due process clause of the 14th amendment to the Constitution of the United States, and denying the equal protection of the laws.

2. The right to vote is a substantial federal question.

3. The effect of the Court's decision, without an opinion, dismissing the appeal is to convert the right of appeal under Section 1257, par. 2, 28 U. S. C. A., into the category of certiorari.

4. The effect of the Court's decision is to hold that an ordinance is not within the purview of a statute as previously held in cases heretofore cited in appellants' Statement as to Jurisdiction, namely:

Smith v. California, 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 205;

Zucht v. King, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194;

Jamison v. Texas, 318 U. S. 412, 63 S. Ct. 679, 87 L. Ed. 868.

5. The practical effects of the court's decision are:

(a) To deny the people throughout the United States a hearing on a question of the greatest importance, involving the health and welfare of users of water everywhere throughout the nation;

(b) To cause the people of St. Louis County to be placed in the position of paying for expensive equipment against their will since it will mean an increase in the rates to be charged for the water, necessitated by the cost of the equipment and the cost of fluoride compounds, together with additional labor;

(c) The failure on the part of the Court to render an opinion also disregards the religious issue which was passed upon by the trial court and by the Missouri Supreme Court, and therefore is appropriate for consideration by this Court.

See Statement as to Jurisdiction, pp. 33 and 42, 43 and 44 (Missouri Supreme Court opinion);
Statement as to Jurisdiction, p. 37;
Transcript, p. 744 (Trial Court opinion).

6. We respectfully, but earnestly, insist that in a record where both appellants and appellees agree that a certain percentage of the population would be harmed by the method of fluoridation suggested, especially since there is another method of accomplishing the purpose, for those individuals who favor fluoridation, as shown by the record in the case, that the Court should grant a hearing on the merits and pass upon the legal questions involved, and at least render an opinion.

In this connection we call the Court's attention to the testimony of Dr. D. R. Van Wyngarden, a dental consultant for the **appellees**, who testified (p. 682, transcript) when asked by counsel for appellees **on direct examination** whether any part of the population would be harmed by consuming water fluoridated to one part per million gallons, that between 10 to 12% of children would be harmed. When asked for his definition of harm (Transcript p. 684) he testified: "Anything which may hinder normal development and growth."

Dr. Frederick B. Exner, expert witness for the appellants, testified (Tr. 181) that between 10 and 40% of children under 13 years would be harmed; that some portion of the population would inevitably be harmed (Tr. 178).

Dr. Martin T. Rippe, dentist, testifying for appellants (Tr. 238) testified that there are several methods of **individual** medication by fluorides such as dispensing of pills to the individual and direct application by the dentist; and these do not involve contaminating the entire water supply.

7. Without desiring to be repetitious, we call the attention of the Court to the fact that only a small percentage of the water fluoridated is drunk by the members of a community, the remainder is used for other purposes. This greatly strengthens our argument that fluoridation should be confined only to those who desire it. It is a gross injustice to force it upon those who do not wish fluoridation, especially in view of the fact that the inhabitants of the incorporated areas, who have a right to vote upon it, are deprived of that right by the ordinance which was illegally passed.

CONCLUSION.

Appellants respectfully submit that when all of the parties to the controversy, appellants and appellees, produced testimony that in a county which had over 400,000 (now 700,000) population, 10% of them at least **would be harmed,** then in the interests of justice it appears that it is incumbent upon the Court to grant a hearing on whether these people can have the benefit of the constitutional provisions mentioned above and fully discussed in the Statement as to Jurisdiction, particularly regarding their liberty of choice in the matter.

Appellants respectfully urge upon the Court to grant a hearing, so that the entire country can obtain the benefit of this Court's views on the questions involved, and particularly the legal questions regarding the right of the

people to determine whether they desire the fluoridation of public water supplies.

Respectfully submitted,

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PA 7-3766,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rules 33 and 38 of the rules of this court.

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J. L. LONDON,
Attorney for Appellants.